SUSTAINING THE FORESTS: REINVENTING THE FOREST SERVICE ADMINISTRATIVE APPEAL PROCESS

by Bradley C. Bobertz and Robert J. Fischman

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FOREWORD

Environmental protection is inextricably linked to process. In **Sustaining the Forests**, the Environmental Law Institute (ELI) tackles the politically contentious and technically difficult issue of appeals from Forest Service decisions. What process, and what rules of decision, will best serve the interests of not only the commodity producers, communities, environmentalists, policy makers, and administrators, but also the forests themselves? ELI attorneys Bradley Bobertz and Robert Fischman have produced a landmark analysis of the complex history of Forest Service appeals, and a cogent proposal for their reform.

The authors insist upon a process that meets the criteria of accuracy, efficiency, and acceptability. They also insist upon a process that is not devoid of content. The prudential requirement is "sustainability." The decisions at issue must not only be in accordance with the minimum prescriptions of law, but also serve the interests for which the National Forests were established and continue to exist.

This kind of policy analysis is not easy, but it is characteristic of ELI. It focuses upon the area where law meets practice, where sweeping policy pronouncements set forth in statutes and regulations are applied to real people, interests, and resources. Law is only as good as its implementation. These recommendations for changes in implementation deserve serious attention by all who are serious about national forest policy.

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President, Environmental Law Institute

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INTRODUCTION

Something is seriously amiss in national forest management. After a staggering investment in planning over the course of the past fifteen years, the U.S. Forest Service now claims it spends up to $150 million a year dealing with administrative appeals.[1] This figure compares to a FY91 budget of $107 million for wildlife and fish habitat and $263 million for timber sales administration.

Despite this investment in appeals, appellants are not satisfied with the system. Environmentalists complain that the Forest Service plays a "shell game" with tiered decisions that makes it difficult to determine whether the agency has complied with environmental laws.[2] Commodities users, especially the timber industry, complain that appeals create costly delay and uncertainty. The Forest Service itself wants to alter its administrative process.[3]

But the problem with the appeal process is more deeply rooted than its cost and results. The current appeals system reflects outdated notions of public land management, fails to achieve legitimate administrative goals, and makes poor use of the courts. The failure of the system undercuts the status of the Forest Service as an expert steward making scientifically based land management decisions. This paper describes the history of and current developments in Forest Service appeals, articulates feasible and appropriate goals for a system of administrative appeals, and suggests reforms.

This paper focuses on Forest Service appeals because they are a fulcrum for leveraging overall improvement in national forest management. Unfortunately, these appeals currently fail to realize their potential as innovative tools because they are designed for an oversimplified model of resource management as informal, discretionary, and purely technical. Although land managers do need to apply their expertise to inventory resources and forecast the consequences of management options, their multiple use mandate cannot be fulfilled without accounting for what the public is demanding from the public lands. The important questions are hybrids containing both technical and social components: *e.g.* what quantities of goods (*i.e.* roadless areas, timber, oil) to produce, which lands are suitable for which uses, and what conditions should be placed on activities.

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[1] Testimony of Dale Robertson, Chief, U.S. Forest Service, *Forest Service Appeals: The Effect the Appeal of Forest Plans and Timber Supply Sales May Have on Timber Supply and the Forest Service's Ability to Meet its Mandate of Multiple Use and Sustained Yield: Hearings Before the Senate Energy and Natural Resources Subcomm. on Public Lands, National Parks and Forests*, 102d Cong., 1st Sess. (Nov. 21, 1991).

[2] *See e.g.* Testimony of Kevin Kirchner, Sierra Club Legal Defense Fund, *Id.*

[3] 57 Fed. Reg. 10444 (Mar. 26, 1992).

Public land decisionmaking is no longer simply an applied natural science exercise. Instead, it is a way to sort out competing interests in the tangible and intangible goods produced by public lands. It is conflict management. Reform of the appeals process will not eliminate conflict but it will improve planning and management.

This paper proposes two major reforms, one procedural and one substantive. The procedural reform would create an interdisciplinary, independent board of forest appeals to hear administrative challenges of Forest Service decisions. The substantive reform would allow the board to decide appeals based not only on technical compliance with specific statutory provisions and regulations but also on application of the sustainability principle evident in modern resource management legislation.

Implementation of these reforms will better achieve all three objectives of any appeals system: Accuracy, efficiency, and acceptability. More importantly, the appeals reform will reinvigorate the century-old concept most often labeled sustained yield management but today frequently called sustainable development. By whatever name, the cultivation of resource management solutions based on this sustainability principle becomes ever more urgent as more people make more intensive demands on natural resources.

Part I of the paper explains the three criteria for evaluating administrative appeals. Throughout the paper we will make reference to these categories in criticizing past, current, and alternative appeals systems. Part II presents a comprehensive description of the Forest Service appeals controversy. It first places the appeals process in the context of overall national forest planning and argues that appeals should be viewed as an integral part of overall management rather than an epilogue to planning. Part II then details appeals reforms of 1983 and 1989, and brings the appeals controversy up to date by describing changes recently proposed by the Bush Administration that move in the wrong direction.

Part III considers the role of the courts in the appeals process. Administrative appeals reform must constructively account for the strengths and weaknesses of judicial review. In particular, administrative appeals must anticipate problems that have frustrated meaningful review of Forest Service decisions: Standing, supplementation of the administrative record, and standard of review. Part III analyzes the important judicial cases that involved appeals of Land and Resource Management Plans. It also discusses project-level challenges that raised legal issues relating to the role of appeals.

Part IV describes our proposal for reforming administrative appeals. First it argues that the Forest Service should employ the sustainability principle as a substantive standard of review in administrative appeals. The sustainability principle incorporates the specific statutes, regulations, and policies with which the Forest Service must comply. Through consistent application of the principle, the proposed board of forest appeals will develop useful precedent, breathing new life into the sustainability idea and implementing statutory provisions that courts are hesitant to enforce. Second, Part IV details how a board of forest appeals would decide appeals. Borrowing procedural elements from both Forest Service and Department of the Interior

experiments in appeals management, and allowing for realistic compromise between appellants and the agency, the independent appeals board would be a hardy mongrel. In Part V we return to the three criteria and explicitly evaluate the strengths and weaknesses of our proposed model.

An Appendix briefly describes the Interior Board of Land Appeals and the Bureau of Land Management protest procedure. Two tables summarize the important appeals procedures discussed in the paper.

I. CRITERIA FOR EVALUATING APPEALS

The three dimensions in which we evaluate an administrative appeals process were described almost thirty years ago by Roger Cramton: Accuracy, efficiency, and acceptability.[4] Although the literature reflects a great deal of soul searching for ideal forms of administrative review,[5] these three axes remain the most reliable guides for measuring the promise of reform.

We will repeatedly return to these three objectives throughout our analysis of appeals. In the final part of the paper we will systematically evaluate, using these objectives as criteria, our proposal to create an independent appeals board to apply the sustainability principle in conjunction with federal law.

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[4] Roger Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 Administrative L. Rev. 108, 112 (1963).

[5] Particularly insightful are: International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650-52 (D.C. Cir. 1973) (Bazelon, concurring); Berg, Reexamining Policy Procedures: Rulemaking versus Adjudication, 38 Admin. L. Rev. 149 (1986); Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Columb. L. Rev. 1 (1975); James O. Friedman, *Review Boards in the Administrative Process*, 117 U. Penn. L. Rev. 546 (1969); Levanthal, 32 Admin. L. Rev. 291-295 (remarks); Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots,* 39 UCLA L. Rev. 1055 (1992); McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 Va. L. Rev. 373 (1961); Preston, *A Right of Rebuttal in Informal Rulemaking: May Courts Impose Procedures to Ensure Rebuttal of Ex Parte Communications and Information Derived from Agency Files after* Vermont Yankee*?*, 32 Admin. L. Rev. 621 (1980); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. Penn. L. Rev. 485 (1970); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law,* 74 Columb. L. Rev. 1231 (1974); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989); Cass Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 Duke L.J. 522.

The following discussion describes appeals objectives and highlights those functions that administrative appeals can accomplish best. Administrative appeals can open decisionmaking to public challenge, clarify a record, and apply a substantive standard of review in ways that courts will not.[6] In addition, an administrative process can better tailor review to the agency's mission and manage conflicts more cheaply and quickly than courts.

A. Accuracy

The most basic objective of an appeals process is to rectify errors. For example, inadequate compliance with requirements for environmental impact analysis, errors in interpretation of regulations, and technical mistakes should be filtered out of the decisionmaking flow by an appeals system. More generally, an administrative appeals system should review the accuracy with which the agency applies the principles that constitute its legislative mandates.

Besides offering the agency a chance to correct mistakes before facing judicial scrutiny, an accurate appeals process will also clarify decisions. An appellate reviewer will ensure that the correctness of a decision is not obscured by opaque language. Besides advancing the public's understanding of the agency's actions, this function will bolster a decision's stability. A clearly reasoned decision, supported by an adequate record, will weather frequent turn-over in resource management staff.

Finally, administrative review for accuracy should separate application of expertise from choice of social policy. Currently, appellants perceive in the Forest Service a bias toward commodity production cloaked in the mantle of science. An appeals process that does not address this suspicion does not adequately manage conflict. Incomprehensible computer programs, sweeping silvicultural prescriptions, and unrealistic natural science predictive models heighten the public's skepticism about the objectivity of Forest Service decisions. The Forest Service is responsible for choosing between incompatible uses. An appeals system that clarifies the difference between these policy choices and scientific judgments will promote a more honest, open planning process that more accurately reflects the real considerations involved in decisions.

B. Efficiency

An efficient appeals system minimizes the cost and delay of reviewing agency decisions. An important goal for any administrative appeals process is to narrow issues for judicial review. Judicial economy is important to appellants, who face greater costs and further delays in complex litigation. An administrative system should hone controversies. The peripheral, nonessential issues to a central dispute can be stripped off by an administrative appeal and leave a sharply defined issue for a court to resolve.

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[6] These issues are discussed in detail in Part III.

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Predictability is an essential element of efficiency because it eliminates the incentive and need to appeal issues repeatedly. An appeals system should produce uniform results in a manner accessible to the public and the agency for use as precedent to guide future decisions. Procedural predictability is also important. Appeals must be resolved promptly according to strict deadlines so that people interested in the outcome can reliably plan contingencies.

A seldom recognized aspect of efficiency that is particularly important to public land management is coordination. An efficient appeals process will ensure that different management units are not working at cross-purposes. Agencies should account for spill-over effects that impose costs on neighboring land managers. A reviewer whose purview is broader than the decisionmaker's can account for such effects and promote more constructive integration of activities and plans. The Forest Service's recent emphasis on landscape management to promote biological diversity[7] requires a broad level of coordination to which an appeals process can contribute.

C. Acceptability

An open appeals system recognizes the importance of public land planning to affected individuals and endows them with the dignity of due process. In a sense, it creates an entitlement where formerly there was merely a privilege to participate at the pleasure of the planner. A person vested with a right to appeal may more readily participate in planning because he has greater assurance that planners will consider his views. Similarly, a good appeals process encourages forest managers to engage more deeply in planning. Public officials must do more than merely appear to deliberate if appeals force them to show *how* they weighed the merits of public views.

Appeal decisions will not be acceptable unless challenges are resolved by a fair, disinterested reviewer. An appeals process that is widely perceived to be biased against appellants cannot issue credible decisions and becomes a hollow exercise in exhausting administrative remedies to reach judicial review.

Another facet of acceptability is to provide a safety valve for disaffected planning participants. Appeals provide an alternative course of action for a person who might otherwise either 1. become frustrated and give up on trying to participate, or 2. try to subvert the agency's decision through external means, such as political pressure or illegal activities.

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[7] Dale Robertson, Chief, U.S. Forest Service, Memorandum to Regional Foresters and Station Directors (June 4, 1992) (cited in *Forest Service Adopts Ecosystem Management on National Forests, 8 Resource Hotline (American Forests)*, at 1 (June 10, 1992)). *See also June 16, 1992 Hearing on H.R. 1969 before House Agriculture Subcommittee on Forests, Family Farms and Energy (testimony of Dale Robertson).*

An open appeals process also legitimizes controversial agency decisions by subjecting them to more rigorous testing. An appeals process strengthens a unit manager's difficult decision by confirming it at a higher level. In this sense, acceptability is closely linked to the accuracy goal to clarify decisions. An honest, accurate decision ultimately is an acceptable decision.

II. THE FOREST SERVICE APPEALS CONTROVERSY

The Forest Service has provided some type of administrative appeals process since 1906. In the early years, appeals procedures were set out in agency manuals and "use" books given to field officers. These procedures were codified for the first time in 1936.[8] Appeals under the 1936 rule were fairly straightforward, and allowed administrative decisions of forest service line officers to be reviewed by their superior officers, the basic model for appeals through the 1980s. Appeals could be brought by those having written authorization to occupy and use national forest lands, those having contracts with the agency, and those having a general interest in national forest management. Before the passage of the National Environmental Policy Act (NEPA)[9], this appeals process was the primary mechanism for challenging management decisions of the Forest Service.

Between 1936 and 1983, the Forest Service revised its appeals rules a number of times. In some variations of the rules, appeals were limited to decisions involving contractors and holders of written instruments with the agency. At other times, appeals were more broadly available to members of the general public, though they were rarely used by the public to challenge management decisions. The appeals process also alternated between a system of review within the agency line officer hierarchy and a system of independent review by an external appeals board. Between 1965 and 1974, for example, appeals were heard by the Board of Forest Appeals, an adjudicatory body independent from the Forest Service.[10] But since that time, the agency has retained an internal appeals process involving review of an officer's decisions by the next highest line officer. In 1988, the Forest Service explained "that it was more administratively comfortable" with this form of review than with the use of an independent board

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[8] 1 Fed. Reg. 1082 (Aug. 15, 1936).

[9] Pub. L. 91-190, 83 Stat. 852 (1970), codified at 42 U.S.C. §§4321-4370c.

[10] The kind of grievances heard by the appeals board "largely concerned contractual issues raised by parties holding a permit or other written instrument with the Forest Service." U.S. Dept. of Agriculture, Forest Service, Report Concerning Required Review of 36 C.F.R. 211.18, Secretary's Administrative Appeal Regulation, at 1 (1987).

of appeals.[11] Unfortunately, the administrative comfort of the Forest Service has not always placed appellants at ease.

This part describes the problems arising from administrative challenges to Forest Service decisions. Section A sets land management decisions in their planning context. In order to evaluate appeals processes, it is important to understand the significance of what is being appealed. Sections B and C describe and contrast the two most recent Forest Service administrative appeals systems. Finally, section D examines the 1992 Forest Service proposal to cut back drastically on opportunities for administrative appeals, and the Congressional response. Table 1, at the conclusion of this report, summarizes the descriptions of the two most recent and the proposed appeals procedures.

A. The Planning Context

Wilkinson and Anderson have described two traditions of planning by the Forest Service: utilitarian and protective.[12] Utilitarian planning, initially employed to promote efficient timber harvests, focuses on maximizing the value of public resource use. Protective planning, originally adopted to control overgrazing, concentrates on restricting use to maintain the integrity of resources. These two strains of planning that trace back to the turn of the century still characterize the land use debate ventilated in appeals.

Although some effort was made to coordinate planning in national forests, most planning prior to the Multiple-Use Sustained-Yield Act of 1960[13] proceeded resource by resource.[14] Then, in 1961, the Forest Service began to address resource use conflicts by preparing regional

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[11] *See* 53 Fed. Reg. 17310, 17311 (May 16, 1988). As the USFS put it,

> the history and nature of [independent review] boards is that they require highly structured, formalized rules of procedure which complicate, rather than simplify, an appeals process. Such complexity is not in the best interest of those appellants who lack the resources to hire legal representation. Moreover, such formalized processes may intensify adversarial relationships with the agency whose decisions are being reviewed and ruled on. Such a relationship is counter to the Forest Service commitment and desire to increase communication and cooperation with the public. In addition, an external board could erode the agency's statutory authority to administer its programs and to supervise, correct, or redirect operations.

53 Fed. Reg. at 17314.

[12] Charles F. Wilkinson and H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Oregon L. Rev. 1, 22 (1985).

[13] Pub. L. 86-517, 74 Stat. 215 *codified at* 26 U.S.C. §§ 528-31.

[14] Wilkinson and Anderson *supra.* at 29.

guides and requiring each ranger district to prepare a Multiple-Use Management Plan which classified its lands into the zones specified in the guides.[15] These plans were replaced in 1973 with Unit Plans, which did not necessarily correspond with ranger districts and which were intended to satisfy NEPA requirements.[16] Although they incorporated a wider variety of zones and more detailed management guidelines than the Multiple-Use Management Plans, the Unit Plans continued the focus on zoning for permissible uses.[17]

In 1974, Congress for the first time mandated national forest planning when it passed the Resources Planning Act (RPA).[18] The RPA requires a service-wide, national perspective that forms the first tier of forest planning. Under the RPA program, the Forest Service prepares a national report every ten years to assess the renewable resources on its lands,[19] every five years to propose long-range strategic objectives for its activities,[20] and annually to evaluate its progress toward the five-year objectives.[21]

When Congress again mandated Forest Service action in 1976, it called for the replacement of Unit Plans with the second tier of forest planning, the Land and Resource Management Plans (LRMPs). The National Forest Management Act (NFMA)[22] revised the organic legislation for the Forest Service in response to mounting pressure to open up the planning process and to a court opinion prohibiting the practice of clearcutting.[23] The LRMPs are often called forest plans because their geographic scope usually corresponds to a single national forest. These plans generally are prepared for ten year cycles, but are amended when conditions or RPA plans change.[24] The forest plans contain a summary of the current resource management situation, a description of the multiple use goals and objectives for the forest,

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[15] *Id.* at 31-32.

[16] *Id.* at 33-34.

[17] *Id.* at 34.

[18] Forest and Rangeland Renewable Resources Planning Act, Pub. L. 93-378, 88 Stat. 479 (1974), codified at 16 U.S.C. §§1600-1614.

[19] 16 U.S.C. §1601.

[20] 16 U.S.C. §1602.

[21] *Id.* at §1606.

[22] Pub. L. 94-588, 90 Stat. 2949 (1976).

[23] West Virginia Div. of the Izaak Walton League of America v. Butz, 544 F.2d 945 (4th Cir. 1975).

[24] The life of some plans may extend fifteen years. 36 CFR 219.10(g).

prescriptions and associated standards and guidelines for each management area zoned in the plan, and monitoring requirements that can be used to evaluate implementation of the plan.[25] Like Euclidian zoning, forest plans prohibit certain uses within areas of the forest but permissible uses may or may not occur. The NFMA and its implementing regulations also provide for public participation in preparation of forest plans through such means as notice, public meetings, information dissemination, and requests for written comments.[26]

The Forest Service planning regulations provide for interaction between these first two tiers of planning. The regional forester forecasts the effects of proposed LRMP alternatives.[27] The regional forester may then mediate any differences between the RPA objectives allocated to the region and the cumulative resources projected to be produced by the individual forest plans within the region.[28] Approval of a LRMP is the decision of the regional forester.[29]

The third tier occurs in the analysis for specific project decisions that implement the LRMPs. Timber sales, special use permits, grazing allotments, and leases are all actions that, before they can be approved, require more site-specific information than the LRMP provides. The LRMP may authorize these activities in a part of a national forest but they cannot actually occur without the Forest Service deciding on a case-by-case basis whether they are appropriate. The Forest Service relies heavily on the NEPA process to conduct its analysis for both project decisions and revisions of LRMPs.

These last two tiers, LRMPs and project decisions, are the most contentious and are the tiers subject to administrative appeal. There are other important actions that drive national forest management that don't fit squarely in one of the three tiers. For instance, the regional guides that set out standards and guidelines are used by the individual forests in preparing LRMPs, but apply to all forests within the region. These guides probably fall somewhere in between the RPA and LRMP tiers. Similarly, congressional appropriations set targets for commodity production that are as broad as RPA objectives, but that are exogenous to the Forest Service.

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[25] 36 CFR 219.11.

[26] 16 U.S.C. §1604(d), 36 CFR 219.6.

[27] 36 CFR 219.12.

[28] See Wilkinson and Anderson at 79-81 for a discussion on the role of the regional forester in reconciling RPA top-down objectives with LRMP goals.

[29] 36 CFR 219.10(c).

B. The 1983 Appeals Rule

1. *Coverage and Levels of Review.*

The 1983 rule, and its predecessor from 1974, relied on a procedure that allowed anyone who disagreed with a line officer's decision to file an appeal with the officer's superior. There were no formal standing requirements. Anyone objecting to an officer's decision could file an appeal. Appeals were initiated by filing a notice of appeal with the deciding officer within 45 days of the decision.[30] After the initial appeal, the appellant was entitled to a second level of appeal at the next highest level within the Forest Service's line of authority, from district ranger to forest supervisor, to regional forester, to Chief, and potentially up to the Secretary of Agriculture.[31]

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[30] 36 C.F.R. § 211.18(c)(1) (1988). The notice of appeal identified the decision under appeal, the decision date, the line officer who made the decision, how the appellant was affected by the decision, and the relief desired. *Id.* § 211.18(e). The time period for filing the notice of appeal could not be extended for any reason. *Id.* § 211.18(d).

When a decision affected a written instrument issued by the Forest Service, the rule required that written notice of the appeal be provided to the parties to the instrument. For others, notification of the appeal was provided through publication in a newspaper of general circulation. *See id.* § 211.18(a)(2)-(3). Certain kinds of actions were excluded from the appeals process, including decisions covered by the Contract Disputes Act, decisions involving FOIA denials, and nine other categories of decisions. *See id.* § 211.18(b). These categories of decisions remain excluded under the current appeals procedure.

[31] The two-level appeals process varied slightly depending on the position of the initial decisionmaker.

- An *initial decision by a district ranger*, such as timber sale, was appealed to the forest supervisor, with a second appeal as of right to the regional forester. 36 C.F.R. § 211.18(f)(1)(i) (1988).

- An *initial decision by a forest supervisor*, such as an amendment to a forest plan, was appealed to the regional forester, with a second appeal as of right to the Chief of the Forest Service. *Id.* § 211.18(f)(1)(ii).

- An *initial decision by a regional forester*, such as the approval of a forest plan, was appealed to the Chief. *Id.* § 211.18(f)(1)(iii). Because the Chief is the highest line officer, there was no second appeal as of right after the Chief's decision in the first appeal. The Chief's appeal decisions, however, were automatically directed to the Secretary of Agriculture for discretionary review. *Id.* § 211.18(f)(2).

2. *Proceedings.*

The "statement of reasons" was the major substantive document submitted by the appellant. It presented the factual and legal basis for the appeal.[32] Unless an extension of time was granted, the statement of reasons was subject to the same time limitation as the notice of appeal -- it had to be submitted within 45 days after the decision being appealed. Extensions could be granted "for good cause shown by the Applicant."[33] The Forest Service Appeals Handbook defined "good cause" as "a reason beyond the control of the requestor."[34] Extensions of time were commonly filed and granted at the time appellants submitted their notice of appeal.[35]

Within 30 days after receiving the appellant's statement of reasons, the deciding officer was required to prepare a responsive statement.[36] This was the major substantive document filed by the deciding officer. The Appeals Handbook provided that the responsive statement "must clearly respond to each reason, or issue, presented in the statement of reasons, and should reflect legal, technical and administrative consideration of matters raised in the statement of reasons."[37] The responsive statement was sent to all parties to the appeal.[38]

- An *initial decision of the Chief*, such as the approval of a regional guide, was appealed to the Secretary of Agriculture. *Id.* § 211.18(f)(1)(iv). If the Secretary failed to take action on the case within 10 days of receiving the appeal, the appeal was automatically denied.

[32] The regulations did not provide substantive guidance as to what the statements of reasons should contain. In practice, they were typically structured like summary judgment briefs.

[33] 36 C.F.R. § 211.18(d)(2) (1988).

[34] U.S. Dept. of Agriculture, Forest Service, Appeals Handbook, FSH 1509.12, § 2.32b (1986) [hereinafter "Appeals Handbook"].

[35] According to the Wilderness Society's 1986 Handbook, *Issues to Raise in a Forest Plan Appeal*, another 45 days was "a reasonable period of time to request for the extension." *Id.* at 20. The same rule for extensions applied to oral presentations, replies to the deciding officer's responsive statement, and comments following the oral presentation. 36 C.F.R. § 211.18(d)(2) (1988).

[36] 36 C.F.R. § 211.18(g) (1988).

[37] Appeals Handbook § 2.41.

[38] 36 C.F.R. § 211.18(g) (1988).

The appellant could submit a "concise reply" to the responsive statement under the 1983 rules. The reply was due within 20 days after the mailing date of the responsive statement. Upon receipt of the appellant's reply (or at the end of the 20-day reply period) the deciding officer sent the appeal record to the reviewing officer.[39]

Any party or intervenor could request an oral presentation before the reviewing officer. This request was also due within 45 days after the underlying decision, and was usually included with the notice of appeal. Oral presentations were informal, and the procedures were established by the reviewing officer. The reviewing officer was required to rule on requests for oral presentation within 10 days after receiving the appeal record from the deciding officer. The Appeals Handbook described the purpose and nature of the oral presentation as follows:

> The objective of an oral presentation is to allow appellants and intervenors to provide their viewpoints and information to clarify the record. The reviewing officer determines the procedures appropriate for an oral presentation, including: the use of tape recorders, allowing for presentation by parties to the appeal in person or by telephone, and allowing for the deciding officer [whose decision is being appealed] to be present. However, since this is not intended as an adversary type of hearing, the deciding officer would be present only to provide information. Further, the reviewing officer may allow all parties to exchange questions and comments. In short, the reviewing officer may prescribe whatever procedures deemed necessary, so long as they (1) are consistent with the regulations and Forest Service policy; (2) allow the concerns of all parties to be heard; and (3) provide a complete appeal record.[40]

After the record had been received by the reviewing officer, and after the oral presentation, if any, the parties had a period of time to supplement the record with additional information.[41] After this period, the appeals record was closed. According to the 1983 rules, the record consisted of:

> a distinct set of identifiable documents directly concerning the appeal, including, but not limited to, notices of appeal, comments, statements of reasons, responsive statements, procedural determinations, correspondence, summaries of oral

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[39] *Id.*

[40] Appeals Handbook § 2.64.

[41] Supplemental information had to be submitted within 10 days after the reviewing officer received the record. Other parties to the appeal then had 20 days to respond to the supplemental information. 36 C.F.R. § 211.18(p) (1988).

presentations and related documents, appeal determinations, and other information the Reviewing Officer may consider necessary to reach a decision.[42]

If the reviewing officer considered the record to be inadequate, he or she could suspend the appeal to request additional information, or remand the case to the deciding officer with instructions for further action.[43]

3. *Intervention and Stays.*

Other persons or organizations could participate in the appeal either through formal intervention or by submitting comments for the record. Formal intervention was discretionary with the reviewing officer, and the regulations required the intervenor to have "an immediate interest in the subject of an appeal . . . ."[44] If intervention was granted, the intervenor enjoyed the same rights as the original appellant, and could advance the appeal forward to the next level if the original appellant dropped the case. Intervenors could not assert new issues not raised by the original appellant, however. As an alternative to intervention, any person or organization could submit written comments for the record.[45]

A stay of the underlying decision was available at any time during the first level of appeal.[46] A stay was "considered only if the Appellant submits information explaining what the Appellant wants stopped and why."[47] Yet the Appeals Handbook established a clear presumption in favor of granting stays: "As a general rule, requests for a stay should be granted unless such a stay would cause considerable harm to Forest Service management activities or have a direct adverse effect on the rights of other parties."[48] If granted, the stay remained in

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[42] *Id.*

[43] *Id.* § 211.18(q).

[44] *Id.* § 211.18(l)(1). The agency's Appeals Handbook directed the reviewing officer to consider the following factors in determining intervention requests: (a) evidence that the intervenor can provide new information on issues raised by the appellant; (b) the nature of the intervenor's immediate interest in the appeal, such as how the intervenor might be aggrieved or adversely affected by the outcome; and (c) any unnecessary delay that might result from the intervention. *See* Appeals Handbook § 2.51(2).

[45] 36 C.F.R. § 211.18(k) (1988).

[46] *Id.* § 211.18(h).

[47] *Id.*

[48] Appeals Handbook § 2.42a(5).

effect for ten days after the decision in the original appeal. Decisions on stays were themselves appealable.[49]

4. *Decision.*

The reviewing officer's decision could be based only on the closed record, and, according to the regulations, "should be made within 30 days of the date the record is closed."[50] The reviewing officer could extend this time if necessary.[51] Although the regulations did not provide a standard of review, the Appeals Handbook stated that "correctness" was the proper standard.[52]

The procedures governing a second appeal as of right were the same as those governing the initial appeal, and required a new notice of appeal, a new statement of reasons and responsive statement, and so forth.[53] The "reviewing officer" of the original appeal simply became the "deciding officer" for the purposes of the second appeal. Where the first appeal was decided by the chief, however, the chief automatically sent his appeal decision to the Secretary of Agriculture without the need for a new notice of appeal. If the Secretary decided to accept the case for review, the Secretary could adopt the procedures which would govern the review, and would not be bound by the requirements of § 211.18.[54]

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[49] 36 C.F.R. § 211.18(o) (1988).

[50] *Id.* § 211.18(r).

[51] *Id.*

[52] Appeals Handbook § 2.94. According to this provision:

> The reviewing officer makes the decision based on the facts presented in the appeal record. The reviewing officer should analyze the case with objectivity to avoid being influenced by the previous actions taken by the deciding officer. It is not sufficient merely to determine from the record that the deciding officer made no clear errors on legal, factual, or policy matters. Rather, the reviewing officer must apply independent judgment and decide, based on the record, whether the deciding officer made a correct decision.

[53] Any stay, however, expired 10 days after the decision in the original appeal. The stay could not be renewed or refiled in the second appeal. *See* 36 C.F.R. § 211.18(h) (1988).

[54] *Id.* § 211.18(f)(5).

C. The 1989 Appeals Rule

1. The Decision to Change Course

In 1987 the Forest Service formed an "Appeal Regulation Review Team" to conduct a service-wide review of the 1983 administrative appeals rule. The team visited various regional offices and national forests and interviewed approximately 160 Forest Service employees. The agency also published a *Federal Register* notice requesting public comments on the appeals process, and it mailed notices to potentially interested individuals and groups. The *Federal Register* notice and the letters were fairly vague about how the Forest Service expected to revise the appeals rules. The *Federal Register* announcement, for instance, indicated that the agency was "interested in hearing" about the appeals process, and was "particularly interested in how well the process meets current needs and what the public likes and dislikes about it."[55] The agency received about 200 letters in response.

The Forest Service published a proposed revision of the appeals system in May 1988.[56] In a nutshell, the agency proposed to retain the old appeals process for one class of appeals and create a new process for all other classes. The old procedures (with minor revisions) would apply to disputes involving written instruments that authorized occupancy and use of Forest System lands. New "streamlined" procedures would apply to all other decisions, including challenges to forest plans and project decisions, which then constituted about 85% of all appeals.

The Forest Service decided to change the appeals rules based on seven "findings" of the review team. To summarize, the team found that:

1. The public believed that appeals are important, but that the old procedures were "cumbersome, inconvenient, expensive, too technical, and too legalistic."

2. The old process was adjudicatory in nature, and thus better suited to the resolution of particular grievances than the review of policies and operational decisions.

3. The old process was time-consuming and expensive.

4. Appeals of plans and projects "may have been legislated into obsolescence" by NEPA and NFMA, which provided opportunities for public involvement earlier in the decisionmaking process. Appeals therefore were a form of "redundant" public participation.

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[55] 52 Fed. Reg. 22348 (June 11, 1987).

[56] *See* 53 Fed. Reg. 17310.

5. Many appeals resulted from miscommunication between the agency and appellants. These misunderstandings could have been, but were not, resolved before appeals were filed.

6. Appeals were abused by the public to delay projects, siphoning resources "from resource management to process management."

7. The public believed that appeals under the old rule were biased against appellants.

Finding 4 is particularly revealing about the agency's attitude toward administrative appeals. According to that finding, post-decision appeals serve the same purposes as pre-decision procedures for public participation. In the years before the public regularly participated in agency decision-making, administrative appeals served as the only means by which the public could challenge agency decisions. After NEPA, however, the public was heard at earlier stages of the process. In this view, NEPA "legislated into obsolescence" the need for administrative appeals. As the agency put it, "[d]ecisions that have been thoroughly analyzed, documented, and subjected to public participation under provisions of these statutes are habitually recycled through the appeals process, giving the public, as it were, redundant opportunities to object to a single decision."[57]

In proposing the new two-track appeals system, the Forest Service indicated that it had rejected a number of other options. These included revising the old process in minor respects, streamlining all appeals under a new unitary system, and eliminating the appeals process altogether. An interesting choice made by the agency was its decision to retain what it considered to be the old "cumbersome" procedures for certain types of appeals. The agency made this decision, it said, because "those appellants who have a legal relationship with the Forest Service through a written instrument or authorization would be short-changed by a new appeal process that provides few procedural or 'due process' requirements."[58]

The Forest Service received over 1000 comments on the proposed revisions to the appeals process. In January 1989, it published a final rule.[59] Despite opposition to the proposed two-track system by many commenters, the final rule retained this system. Streamlined appeal procedures were instituted for decisions documented under NEPA and NFMA, including LRMPs

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[57] 53 Fed. Reg. at 17313. This finding appears to characterize administrative appeals as offering merely a "second bite of the apple" that has no purpose beyond recycling stale objections raised during the NEPA process. According to the agency, "[t]he issue is 'how many hurdles must be cleared before management decisions may be implemented?'" 53 Fed. Reg. at 17313.

[58] 53 Fed. Reg. at 17314.

[59] 54 Fed. Reg. 3342 (January 23, 1989).

and project decisions.[60] The appeals procedures under the 1983 amendments were retained for appealing decisions involving written instruments authorizing use and occupancy of National Forest System lands.[61]

The preamble to the final rule reiterated the agency's view about the purpose of forest appeals. Part 217 gives interested individuals "one more opportunity, following and in addition to their input during the planning process, to seek agency oversight and reconsideration at a higher level . . . ."[62] Here again the agency asserted that administrative appeals are just another type of "public participation" identical to the pre-decision public involvement opportunities provided by NEPA. Indeed, in the agency's view, post-decision appeals are *less* important than pre-decision participation: "we believe that public participation and involvement in planning and decisionmaking is more effective prior to making the actual decision than afterwards."[63] This conclusion appears to be the prime justification for streamlining the appeals procedures under Part 217. If appeals offer merely a second, less important opportunity for public involvement in forest planning, it makes sense not to overburden appeals with excessive "due process."

2. *The Final Rule*

The important procedural elements of the January 1989 rule are described below.

a. *Coverage and Levels of Review.*

Part 217 appeals apply to "written decisions governing plans, projects, and activities to be carried out on the National Forest System that result from analysis, documentation, and other requirements of [NEPA and NFMA], and the implementing regulations, policies, and procedures . . . ."[64] Only those decisions documented in a "Decision Memo, Decision Notice, or Record of Decision" could be appealed. Thus Part 217 does not apply to preliminary decisions made before the release of final plans and other decision documents.[65] Notice of decisions by the

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[60] These procedures are codified at 36 C.F.R. Part 217 (1992).

[61] These procedures are codified at C.F.R. Part 251, Subpart C (1992).

[62] 54 Fed. Reg. at 3343.

[63] *Id.* at 3344.

[64] 36 C.F.R. § 217.3(a) (1992).

[65] *Id.* § 217.3(a)(1). As under the prior rule, Part 217 excludes several categories of decisions, including FOIA denials, decisions covered by the Contract Disputes Act, and personnel matters. *Id.* § 217.4. Added to this list of exclusions are "[d]ecisions related to rehabilitation of National Forest Service lands and recovery of forest resources resulting from natural disasters . . . when [a regional forester or the chief determines] that good cause exists to exempt such

Chief are published in the *Federal Register*, and notice of other decisions are published in newspapers of general circulation.[66]

Part 217 eliminates the availability of two levels of review. Except for initial decisions of district rangers, a second level of review is discretionary under Part 217. Many commenters objected to this change, arguing that it would lead to cursory review, discourage negotiated settlements, and promote increased litigation. The agency concluded, however, that single-level review "best fits the intent" of the new rule:

> It simplifies the process, improves the potential to process appeals in a timely manner, yet retains the option for a second review. Inherent in the process is the requirement for full and proper use of the NEPA process. The NEPA process requires Federal agencies to involve the public early and continuously throughout the decisionmaking process; thus a fair and open hearing on issues related to a decision are [sic] available. Lastly, the intent of a rule is dispute resolution by establishing stronger ties between the initial decisionmaker and the public, all in the overall interest of making better National Forest management decisions.[67]

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decisions from review under this part." *Id.* § 217.4(11). According to the agency, this new exclusion reflected "the agency's experience with the devastating forest fire season of 1987 . . . ." 53 Fed. Reg. at 17320.

[66] 36 C.F.R. § 217.5 (1992).

[67] 54 Fed. Reg. at 3348. In response to public comments, the agency did retain two levels of review for initial decisions of district rangers. *See* 54 Fed. Reg. at 3348.

The appeals process under part 217 can be summarized as follows:

- An *initial decision by a district ranger*, such as a timber sale, is appealed as of right to the forest supervisor, with the opportunity for a second appeal to regional forester. 36 C.F.R. § 217.7(c) (1992). But unlike the second appeal under the 1983 rule, review is based only on the existing record with no opportunity for additional submissions. There is no discretionary review after the second appeal. *Id.* § 217.7(e)(3).

- An *initial decision by a forest supervisor*, such as an amendment to a forest plan, is appealed as of right to the regional forester. *Id.* § 217.7(b)(1). After the regional forester's appeal decision, the chief has discretionary review. *Id.* § 217.7(e)(1).

- An *initial decision by a regional forester*, such as the approval of a forest plan, is appealed as of right to the chief. *Id.* § 217.7(b)(2). After the chief's appeal

b. *Proceedings.*

To commence an appeal under part 217, a person must file a "notice of appeal" with the reviewing officer (rather than with the deciding officer as under the 1983 rule).[68] The notice of appeal has to be filed within 45 days of "project decisions and non-significant amendments to land and resource management plans," and within 90 days of "land and resource management plan approvals, significant amendments, or revisions, and . . . other programmatic decisions documented in a Record of Decision."[69]

The notice of appeal must set forth the appellant's arguments in the case.[70] The opportunity to file a subsequent "statement of reasons" -- the appellant's main substantive document under the 1983 rule -- is no longer available. All arguments have to be provided in the notice of appeal, subject to the time limitations indicated above. The deciding officer's

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decision, the Secretary of Agriculture has discretionary review. *Id.* § 217.7(e)(2).

- An *initial decision by the chief*, such as the approval of a regional guide, is appealed to the Secretary of Agriculture. This appeal is discretionary. If the Secretary does not decide to review the case within 15 days, the appeal is automatically denied. *Id.* § 217.7(a).

The 1989 rule does not affect the levels of review available for appeals of forest plans. As under the 1983 rule, there is a single appeal as of right to the chief, followed by discretionary review by the Secretary of Agriculture. *Compare* 36 C.F.R. §§ 211.18(f)(1)(iii) & (f)(2) (1988) *with* 36 C.F.R. §§ 217.7(b)(2) & (e)(2) (1992).

[68] As originally promulgated, Part 217 required the notice of appeal to be filed with both the reviewing officer and the deciding officer. Failure to comply with this "dual filing" requirement resulted in dismissal of the appeal. *See* 36 C.F.R. § 217.8(a)(1) (1990). The agency eliminated the "dual filing" requirement in February 1991. *See* 56 Fed. Reg. 4914 (Feb. 6, 1991). As amended, § 217.8 (a)(1) requires duplicate copies of the notice of appeal to be filed with the reviewing officer, who then sends one of the copies to the deciding officer.

[69] 36 C.F.R. § 217.8(a)(2)-(3) (1992).

[70] *Id.* § 217.9. This section provides:

> (a) It is the responsibility of those who appeal a decision under this part to provide a Reviewing Officer sufficient narrative evidence and argument to show why the decision by the lower level officer should be changed or reversed. (b) At a minimum, a written notice of appeal filed with the Reviewing Officer must: * * * * (6) State the reasons for objecting, including issues of fact, law, regulation, or policy, and, if applicable, specifically how the decision violates law, regulation, or policy . . . .

"responsive statement" is likewise eliminated, as is the appellant's opportunity to reply to the responsive statement. Instead, the deciding officer must prepare a response to "indicate where the [decision] documentation addresses the issues raised in the notice of appeal."[71] The deciding officer is required to transmit the pertinent records within 30 days of receiving a copy of the notice of appeal. This period cannot be extended.[72]

There is no opportunity for oral presentations under the new rule. The record closes either when the deciding officer transmits the appeal record or when intervenors' comments are received, whichever is later.[73]

c. *Intervention and Stays.*

As originally proposed, the 1989 rule would have eliminated intervention. The agency explained "that providing all the 'formal' embellishments of intervention is unnecessary and counterproductive to achieving the initial goals of offering a separate, less formal process for review of management decisions."[74] But after receiving many negative comments on this proposed change, the agency reinstated a "streamlined" form of intervention in the final version of Part 217.[75] Under the new intervention rule, requests to intervene are granted if received within 20 days after the filing of the first level appeal. Intervenors can submit comments on issues raised in the notice of appeal, receive and comment on additional information (if it is requested by the reviewing officer), and participate in meetings to negotiate a resolution. In contrast to the 1983 rule, intervenors cannot intervene at any time, request a stay, or continue the case if the original appellant withdraws the appeal.

There have been problems with intervention under Part 217. Intervenors complained that there were no reliable means for learning that an appeal had been filed. This caused them to miss the 20-day time limitation for intervention. Even if they made the deadline, 20 days did not leave them time to prepare adequate comments. In October 1991 the agency published a proposed rule that would address this problem.[76] This proposal would require reviewing officers to provide anyone who requests it a list of pending appeals for any specific decision. The rule would also allow intervenors to submit comments within 50 days from the close of the appeal period.

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[71] *Id.* § 217.15(b).

[72] *Id.* § 217.15(a).

[73] *Id.* § 217.15(e).

[74] 54 Fed. Reg. at 3347.

[75] *See* 36 C.F.R. § 217.14 (1992).

[76] *See* Fed. Reg. at 41357.

Implementation of a decision is automatically delayed for 7 days following publication of the notice of decision.[77] After that, an appellant can request a stay of actions which would be implemented before the appeal decision is issued. The appellant has to file a written request for a stay with the reviewing officer, specifying the adverse effects of the activity on the appellant, the harmful impacts of the activity on resources in the area, and how these effects and impacts would prevent a meaningful decision on the merits.[78] In deciding the stay request, the reviewing officer considers: "(1) Information provided by the requester . . . ; (2) The effect that granting the stay would have on preserving a meaningful appeal on the merits; (3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and (4) Any other factors the Reviewing Officer considers relevant to the decision."[79] The reviewing officer is required to issue a written decision on a stay request with 10 days. The stay decision is not subject to discretionary review at the next level, unless the reviewing officer is a forest supervisor reviewing a decision of a district ranger.[80]

d. *Decision.*

Time limitations for deciding an appeal are calculated from the date of filing of the notice of appeal. The relevant time periods are 100 days for project decisions, 160 days for land and resource management plan approvals, amendments, and revisions, or programmatic decisions documents in a Record of Decision, and 30 days for second-level appeals of a district ranger's decision.[81] These time periods can be extended by the reviewing officer to request additional information from the parties, or to allow for negotiation.[82]

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[77] 36 C.F.R. § 217.10(a) (1992).

[78] *Id.* § 217.10(d)(3)(ii).

[79] *Id.* § 217.10(f).

[80] *Id.* § 217.10(i). As originally proposed, Part 217 would have made stays automatic unless the reviewing officer determined there was "an urgent, compelling need to proceed with the project." 53 Fed. Reg. at 17325. In comments, however, "[m]any respondents pointed to a dual standard because in 36 C.F.R. Part 251 the appellant has to justify the request for stay while under 36 C.F.R. Part 217 the government is required to justify not granting a delay request." 54 Fed. Reg. at 3349. In response to these "dual standard" complaints, the agency placed the burden of justifying a stay on the appellant in both situations.

[81] 36 C.F.R. § 217.8(e) (1992).

[82] *Id.* § 217.13(c). Unlike the 1983 rule, Part 217 makes explicit the authority of the deciding officer to conduct negotiations during an appeal:

> When a decision is appealed, appellants or intervenors may request meetings with the Deciding Officer to discuss the appeal, either together or separately, to narrow

The 1989 rule also eliminated the substantive review standard of "correctness." Instead of providing a standard to evaluate the decision being appealed, the 1989 rule merely states that the appeal decision itself "must be consistent with applicable law, regulations, and orders."[83]

e. *Discretionary Second-Level Appeals.*

Where a second level of discretionary review is available, the reviewing officer is required to forward copies of the decision and decision documents to the next highest line officer within one day after rendering the appeal decision.[84] The higher level officer has 15 days to decide whether to take the case. If this period expires before the officer takes action, the decision of the reviewing officer stands as the final administrative decision of the Department of Agriculture.[85] If the higher level officer decides to take the appeal, he is required to conclude the review within 30 days.[86] That decision then becomes the final administrative action of the Department.

D. The 1992 Proposal to Eliminate Project-Level Appeals

The 1989 amendments did little to quell the escalating debate over the administrative appeals program. To the forests products industry, unions, and timber-dependent communities in the West, appeals had come to represent a serious obstacle to the steady flow of timber and a main culprit in the region's economic decline. These charges came to a head in November 1991, during a Senate hearing on the appeals program.[87] Several Senators, most notably

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issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. Reviewing Officers may, on their own initiative, request the Deciding Officer to meet the participants to discuss the appeal and explore opportunities to resolve the issues. *Id.* § 217.12(a).

[83] *Id.* § 217.16(c). Unfortunately, reviewing officers and their staffs usually lack legal expertise.

[84] *Id.* § 217.17(b).

[85] *Id.* § 217.17(d).

[86] *Id.* § 217.17(f).

[87] *See Forest Service Appeals: The Effect the Appeal of Forest Plans and Timber Supply Sales May Have on Timber Supply and the Forest Service's Ability to Meet its Mandate of Multiple Use and Sustained Yield: Hearings Before the Subcomm. on Public Lands, National Parks and Forests*, 102d Cong., 1st Sess. (1991). [hereinafter *Hearings I*].

Senators Packwood[88] and Hatfield from Oregon, complained that many administrative appeals were frivolous, designed merely to stop or delay timber sales and leading to the closure of timber mills and the loss of jobs. "Too many environmental groups are seeking a lock-up [of timber]," Senator Hatfield said. Forest Service Chief F. Dale Robertson echoed these charges. He estimated that between $100 and $150 million was spent each year reworking timber sales and other projects as a result of the appeals program.[89]

On March 19, 1992, Agriculture Secretary Edward Madigan announced that its rules would be revised to eliminate appeals of timber sales and other project-level decisions as one of 13 measures designed to ease the department's regulatory burden on American business.[90] The proposal came as a shock to many observers, since it reversed 85 years of agency practice and contradicted repeated claims by the Forest Service that the appeals program was an integral part of the agency's decisionmaking process.[91]

Instead of allowing administrative appeals for project-level decisions, the agency would rely solely on a period of pre-decisional public notice and comment.[92] Notice of each project-level decision documented in an Environmental Assessment and Finding of No Significant

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[88] At the time, Senator Packwood was sponsoring a bill which would significantly circumscribe administrative appeals of timber sales. *See* S. 1156, 101st Cong., 2d Sess. (1991) (the "Federal Land and Families Protection Act").

[89] *Hearings I* at 25.

[90] The proposal to eliminate project-level appeals is published at 57 Fed. Reg. 10444 (March 26, 1992). This proposal was part of a larger deregulatory effort launched by the President during his State of the Union address in January 1992, in which he announced a moratorium on new regulations and directed agencies to revise existing rules to reduce their cost to business. Environmental regulations were a special target of this deregulatory push. For background and discussion, see Scheider, *Environment Laws are Eased by Bush as Election Nears*, N.Y. Times, May 20, 1992, at A1, col. 4 (late ed.).

[91] For example, in interviews with Forest Service employees across the county, the 1987 Appeals Regulation Review Team found that "[p]robably the comment the team heard most often was that 'We are proud to work for an Agency that has an appeals process and we should never seriously consider getting rid of it.'" U.S. Dept. of Agriculture, Forest Service, *Appeals Review Briefing Paper* 7 (Sept. 1987). Similarly, in proposing the 1989 amendments to the appeals rule, the agency stated: "From its infancy, the agency has felt the need to offer some kind of process to review decisions and has perceived such reviews as beneficial and necessary for carrying out its mission of managing the National Forest System." 53 Fed. Reg. at 17311.

[92] As noted in the supplementary information of the proposed rule, a number of Forest Service units already use pre-decisional notice and comment procedures in addition to post-decisional appeals. *See* 57 Fed. Reg. at 10447.

Impact (EA/FONSI) would be published in a newspaper of general circulation.[93] Interested members of the public would then have 30 days to submit comments on the proposed action. After the close of the comment period, the responsible Forest Service official would have 21 days to reach a final decision on the project, unless further environmental analysis was necessary or consideration of comments could not be completed within 21 days.[94] Administrative appeals would be limited to final decisions approving, revising, or significantly amending LRMPs.

The agency's rationale for cutting back on administrative appeals was almost exclusively an economic one. The agency repeated the often-voiced complaints of industry that appeals block the supply of timber, creating economic upheaval in communities dependent on the steady flow of "goods and services" from the agency. In addition, administrative appeals were depicted as time-consuming, procedurally onerous, and, in many cases, "frivolous" attempts to block projects, draining resources that could be better spent in on-the-ground activities. Because appeals afford disgruntled parties little more than another opportunity to air their views -- an opinion that was first used to justify the agency's 1989 amendments to the appeals rule -- this second bite of the apple could safely be eliminated without harming the public's ability to influence Forest Service decisions.

The agency's rationale was neatly summed up in a single paragraph in the proposed rule's preamble:

> The current appeal regulation adversely affects the agency's ability to implement projects by diverting the efforts of its workforce from on-the-ground resource management activities to processing administrative appeals. Appeals can increase the cost, and sometimes substantially diminish the cost-effectiveness, of a project through the time it takes the agency to complete an appeal, even though the original decision might ultimately be upheld. Also, administrative appeals adversely affect jobs, families, and communities dependent upon Forest Service goods and services. Many communities dependent upon the National Forests for their economic livelihood depend upon the Forest Service being able to achieve congressionally funded programs in mining, grazing, timber, recreation, fisheries and wildlife. The current post-decisional appeal process creates uncertainty as to the Forest Service's ability to deliver those goods and services, impeding economic growth and development. Delays in delivery of National Forest System goods and services can place the economic viability of communities at risk. The delays arising from the appeals process also can adversely affect the cost of homes, Federal payments for local schools and roads, and costs to the Federal government.[95]

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[93] Proposed amendment to 36 C.F.R. § 217, 57 Fed. Reg. at 10448-10449. Responsible Forest Service officers would publish in the *Federal Register*, twice annually, a list of the principal newspapers for public notice of project-level decisions. *Id.*

[94] *Id.* (proposed 36 C.F.R. § 217.26).

[95] 57 Fed. Reg. at 10445-46.

The proposal ignited a firestorm of controversy. In all, the Forest Service received more than 30,000 comments on the proposal, perhaps a record for responses to a Department of Agriculture proposal. The comments ranged from short, handwritten expressions of anguish or encouragement[96] to long, brief-like arguments. Not all comments were on paper. A group of about 100 commenters from Montana signed their names below the statement "We Support the Proposed Appeal Regs." on a door-sized piece of laminated pine with the agency's address burned into the reverse side.

Debate over the proposal was taken up by industry and environmentalists in opinion columns, letters to editor, and radio and television stories across the country. The rhetoric on both sides reflected anger and frustration. Those supporting the proposal generally viewed administrative appeals as the leading culprit in the economic decline of timber communities, and as a vehicle for outsiders to manipulate Forest Service decisions at the last moment.[97] Opponents of the proposal saw it as a serious blow to the public's ability to participate in decisions affecting public forests, and evidence of the Bush Administration's capitulation to the short-term demands of timber interests.[98]

The atmosphere surrounding appeals remains one where fact is easily mixed with metaphor. It is not as if both sides of the debate see the same set of facts but disagreed about their meaning. They appear to be looking at entirely different and contradictory sets of assumptions.[99] Proponents of the appeals cutback frequently cite Chief Robertson's estimate

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[96] A commenter from Covington, Virginia sent a handwritten note that said simply: "I *SUPPORT* THESE CHANGES IN USFS APPEAL REGULATIONS. YOU CAN NOT DO BUSINESS WITH .29 STAMPS THAT PUT A STOP TO EVERY PROJECT. GO FOR IT!"

[97] In a representative comment, the President of the California Forestry Association said, "For too long, the preservationists have manipulated the Forest Service - virtually crippling the entire forest resource industry and the forest communities by misusing the appeals process. Now the agency may be able to recover from the paralyzing mountain of costly appeals it has faced. The preservationists abuse the process to delay thousands of timber sales each year. Instead of being used as a legitimate process for citizen concern and input, they have turned the process into a costly circus." *California Forestry Association Applauds the Bush Administration for Proposal to Limit Appeals*, Business Wire (Mar. 20, 1992).

[98] Kevin Kirchner, a lawyer with the Sierra Club Legal Defense Fund, said that "[t]he idea is to build a wall around [Forest Service] decisions and not have to bother with citizens challenging them." Kenworthy, *Plan to Ax Timber-Sale Appeals Provokes Letters*, Wash. Post, April 28, 1992, at A13, col. 1.

[99] To establish a common pool of useful data, Professor Carl Tobias has called for a "systematic empirical evaluation of the appeals process." Tobias, *Fact, Fiction, and Forest Service Appeals*, 32 Natural Resources J. -- (1992) (forthcoming). Tobias suggests the Administrative Conference of the United States as particularly well suited to conduct such a

that timber sale appeals cost the Forest Service as much as $150 million a year, and claim that appeals tied up about 30 percent of the available supply of timber in 1991. They also characterize many of the appeals as "frivolous," and say that the appeals program is frequently abused by preservationists filing "29 cent appeals." Opponents of the proposed appeals rule dispute these figures, claiming that appeals in fact *save* money for the Forest Service by enabling it to catch errors early in the process and correct other projects before they are underway. Conservationists point out that the agency has not backed up its cost figures and allegations of abuse with empirical data, suggesting that the numbers were cooked and the accusations exaggerated. Moreover, if abuse does exist, they argue that the Forest Service has authority to dismiss groundless cases through the dismissal provisions of the existing rule.[100]

The most comprehensive analysis of the appeals program was provided by the Office of Technology Assessment and the Congressional Research Service in separate reports made public in the spring of 1992.[101] The OTA report -- a 206 page book critical of Forest Service policy -- concluded that "most appeals appear to be justified" and that delays in timber sales were attributable to the Forest Service's difficulty in complying with the appeals system rather than to problems with the system itself.[102] The OTA report stated that the appeals program "has been a valuable tool" for the agency for a number of reasons:

> It has provided an internal mechanism for clarifying the legal requirements and for testing the soundness of decisions and the appropriateness of current policies and procedures. In addition, the appeals process can lead to better and more consistent decisions by encouraging more responsibility and accountability on the part of deciding officers. Through appeals decisions, the agency has clarified: 1) what decisions are to be made in forest plans, 2) the relationship between decisions made in the plans and those made during implementation, and 3) the standards for the environmental analyses required by NEPA. Appeals have also helped the agency establish uniform policies to address various issues, such as the nontimber benefits of below-cost sales; the adequacy of a plan's timber demand analysis; and the appropriateness of the plan's allowable sale quantity. Other

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study.

[100] 36 C.F.R. § 217.11(2) (1992) requires the reviewing officer to dismiss an appeal when "[t]he requested relief or change cannot be granted under law, fact, or regulation existing when the decision was made."

[101] U.S. Congress, Office of Technology Assessment, *Forest Service Planning: Accommodating Uses, Producing Outputs, and Sustaining Ecosystems*, OTA-F-505 (Feb. 1992) [hereinafter "OTA Report"]; Congressional Research Service, The Library of Congress, *Administrative Appeals of Forest Service Timber Sales*, 92-349A (April 8, 1992) [hereinafter "CRS Report"].

[102] OTA Report at 97.

> issues addressed in administrative appeals have included guidance on management, indicator species and biological diversity, and adequacy of resource monitoring plans. Because the appeals process has forced the agency to address and resolve novel and complex questions under NEPA and NFMA in this first round of plan development, revising forest plans may be easier than preparing the initial plans.[103]

The CRS Report took issue with several of the agency's empirical assumptions about timber sale appeals. First, the report questioned the extent to which the timber supply has been disrupted by appeals, noting that only 10.3 percent of the agency's commercial timber sales were affected by appeals in fiscal 1991.[104] Second, the report asserted that the agency's failure to meet its timber sale targets in fiscal 1991 was due only in part to administrative appeals, and that other factors, such as litigation over the spotted owl and old-growth forests, accounted for some of the delays. Administrative appeals caused the agency to miss only about five percent of its timber targets, the report stated.[105] Third, the report indicated that 17 percent of fiscal 1991 timber sale appeals were dismissed, suggesting that the agency was already dealing with frivolous appeals in an appropriate manner. Fully a third of timber sale appeals in fiscal 1991 resulted in the withdrawal or remand of the sale, indicating that these appeals were probably not frivolous.[106] Fourth, the report noted that most timber sale appeals were resolved in a timely manner, averaging 3.4 months, thus casting doubt on the claim that appeals create long delays and uncertainty in timber supplies. Fifth, agency figures show that direct and indirect costs of timber sale appeals total less than $3 million. Sixth, the report questioned Chief Robertson's estimate that reworking sales as a result of administrative appeals cost the agency between $100 and $150 million. Appeals that result in reworked timber sales may actually save the agency money, the report stated, "if they prevent subsequent litigation based on those rulings."[107] And finally, the report observed that stays of timber sales during administrative appeals do not appear to pose a problem, since most appeals are resolved in a timely manner.[108]

Although the OTA and CRS reports added important insights about the effect of the appeals program, they did little to bring the warring sides of this controversy any closer together. The reports were often cited in the comments of conservationists arguing against the elimination of timber sale appeals. Timber groups tended to pay them little heed. The two sides remained

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[103] *Id.*

[104] CRS Report at 3.

[105] *Id.*

[106] *Id.* at 3-5.

[107] *Id.* at 6.

[108] *Id.*

staunchly camped in their opposing positions. The possibility of reconciling their views appeared remote.

On May 21, 1992, Georgia Senator Wyche Fowler, chair of the Senate Agriculture forestry subcommittee, led an oversight hearing on the appeals proposal. After listening to Forest Service Chief Robertson testify about the problems caused by the appeals program,[109] Fowler accused Robertson of exaggerating the problems, and said that the proposal to eliminate appeals "will not stand."[110] Fowler continued:

> This thing's not going to work. . . . You are not going to solve the problem by saying you want less public participation.
>
> To go in and say, 'Well, we'll listen to these people, but if we disagree with them, tough. That's it. Book closed. You have no appeal. We are the government, not you. . . . I am the god of the forest.' . . . You're asking for more trouble than I can imagine.[111]

Later, House Speaker Thomas Foley wrote a letter to Secretary Madigan expressing his concern that the appeals proposal would violate the legal guarantees of "full and open public participation in the processes of the Forest Service" and "significantly weaken any efforts by the administration or by the Congress to restore public confidence in the agency's decisions."[112] This provoked a response from Senator Bob Packwood, who in a separate letter to Secretary

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[109] Robertson said, among other things:

> Our timber sale program is in chaos; it's a shambles. It'd be like trying to put 100 design engineers on the assembly line as cars are trying to be made and tell them we need new ideas on how to produce a better car while we're trying to make a car. . . . Our people are canceling, they're backing up, they're throwing out timber sales. You cannot believe the amount of shuffling that's going on with appeals, lawsuits, all these other things.

Bradley, *Forest Chief Challenged on Plan to Curb Appeals*, Gannet News Serv., May 21, 1992.

[110] *Id.*

[111] *Id.* On July 1, 1992, Senator Fowler introduced a bill that would require the Forest Service to establish both pre-decisional notice and comment procedures and post-decisional administrative appeal procedures for project-level decisions. *See* S. 2921, 102d Cong., 2d Sess. (1992). A similar companion bill was introduced the next day in the House. *See* H.R. 5547, 102d Cong., 2d Sess. (1992).

[112] Schaefer, *Foley Acts to Save Timber-Cut Appeals*, Seattle Times, June 24, 1992, at B5 (final ed.).

Madigan urged the agency to adopt the appeals proposal "despite opposing pressure" from the House Speaker.[113]

Finally, in the final days of the 102d Congress, legislators slapped together a compromise preserving project-level appeals. Inserted as section 322 of the 1993 Department of the Interior and Related Agencies [including the Forest Service] Appropriations Act,[114] the legislation addresses both aspects of the March, 1992 proposed rule: Notice and comment requirements, and appeals of project-level decisions (including timber sales).

The legislation adopts the proposed rule requirement that the Forest Service provide notice and allow 30 days for comments on project-level decisions.[115] The legislation, however, broadens the requirement in two ways. First, in addition to publishing the notice in a newspaper of general circulation, the agency must also mail the notice to anybody who requests it or "who has participated in the decisionmaking process."[116] In order to effectuate this broadening, the agency must interpret "participated in the decisionmaking process" to include contributing to the LRMP that guided the project decision. Also, the Forest Service should allow people interested in knowing about all project-level decisions in a particular forest to submit a general request for notice. Requiring a project-specific inquiry to receive notice would place the public in a catch-22 where a person needs to know about a proposed decision in order to request notice of it. Second, the legislation requires this notice for all decisions, not just those documented in an EA/FONSI.[117] This is a less important distinction because most decisions not subject to a FONSI will go through the EIS scoping process. Unlike the proposed rule, the legislation places no time limit on the Forest Service to make a final decision after the comment period closes.

Although the legislation rejects the USDA proposal to eliminate administrative appeals for project-level decisions, it does restrict appeal opportunities. The legislation limits appeals to persons who participated in the thirty day public comment process.[118] This marks the first time that Forest Service administrative standing has been linked to earlier participation in a public comment process. The legislation does not provide for a waiver of this requirement where the final decision raises issues not evident in the notice of the proposed action. The legislation retains the current 45 day deadline for filing an appeal after a final decision.

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[113] *Northwest Timber III: Packwood Pushes to Eliminate Appeals*, American Political Network, Inc., Greenwire, June 29, 1992.

[114] Pub. L. 102-381. President Bush signed the Act on Oct. 5, 1992.

[115] Pub. L. 102-381, § 322(b).

[116] *Id.* at §322(b)(1)(A).

[117] *Id.* at §322(b)(1).

[118] *Id.* at §322(c).

The appeals process mandated by Congress begins with an opportunity for informal settlement. Someone from the Forest Service will contact an appellant and offer to meet to dispose of the appeal.[119] If the appeal cannot be settled informally, the Forest Service conducts a formal review. Formal review requires an appeals review officer, who is a line officer at least at the level of the initial decisionmaker, to make a recommendation to the official responsible for ruling on the appeal.[120]

The Forest Service has a deadline of 30 days after the closing date for filing an appeal (with a 15 day extension) to formally review and rule on the appeal.[121] However, the Forest Service suffers no penalty for missing this tight deadline. In fact, the legislation provides an incentive for the agency to drag its feet on appeal disposition. If the Forest Service fails to decide an appeal in the 45 days (30 day deadline plus extension of 15 days), then the appealed decision is deemed a final agency action.[122] The automatic stay of decisions expires 15 days later.[123] Thus, a convenient way for the Forest Service to deal with a difficult appeal will be to miss the deadline for disposition. Fifteen days later, the agency may proceed with the project without having responded to the appellant's allegations. Under the 1989 §217 appeals rule, the Forest Service often missed its 100 day deadline to decide project-level appeals.[124] Thus, Congress has essentially required the Forest Service to maintain a project-level appeals process on paper only. The actual effect may be no different from the March, 1992 USDA proposal.

Lost in the cacophony surrounding appeals reform is the fact that conservationists were almost as unhappy with the appeals system before the 1992 USDA proposal as timber groups were. Conservationists generally argue that line officer review is biased against them, appeal decisions are unresponsive to legal arguments, and the deadline for developing their argument in the notice of appeal does not allow enough time to adequately develop their grievance. Until their battle strategy shifted to an attempt to save the existing rule, conservationists appeared to agree with timber groups about at least one fact: There had to be a better way to handle appeals.

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[119] *Id.* at §322(d)(1).

[120] *Id.* at §322(d)(2).

[121] *Id.* at §322(d)(3).

[122] *Id.* at §322(d)(4).

[123] *Id.* at § 322(e).

[124] 36 C.F.R. § 217.8(e)(1992).

III. JUDICIAL REVIEW OF FOREST SERVICE DECISIONS

Appeals do not end with the exhaustion of the administrative process. Many appellants unhappy with the outcome of line officer review have taken their cases to court. The Forest Service maintains that neither the NFMA nor any other law requires it to hear administrative challenges to its resource management decisions.[125] However, even though the NFMA does not explicitly provide for judicial oversight of Forest Service decisions, federal law gives persons harmed by administrative action the right to seek review in federal district court.[126] The courts remain the ultimate guarantors of fairness in public resource management.

Litigation challenging Forest Service decisions involves a wide array of subjects and statutes that reflect the diverse resources produced and constituencies served by the agency.[127] Nonetheless, most cases involve alleged violations of the NFMA and NEPA. These two statutes work in tandem to structure the system by which planning and project decisions are made. The

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[125] ***But see*** Mark Squillace, Administrative Review of U.S. Forest Service Decisions, *in* American Bar Association Section of Natural Resources, Energy, and Environmental Law, NATURAL RESOURCES AND PUBLIC LANDS DECISIONS: ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW (May 22, 1992) 5. Professor Squillace argues that section 6 of the APA requires all federal agencies, whether or not they have formal appeals procedures, to respond to appeals made by interested persons. The APA states:

> So far as the orderly conduct of business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

5 U.S.C §555. The Senate Committee Report on the APA explained this provision:

> The section affords the parties in an agency proceeding, whether or not formal or upon hearing, the right to prompt action upon their requests, immediate notice of such action, and a statement of the actual grounds therefor.

S. Doc. No. 248, 265-68 (1946) (quoted in Squillace, *id.*).

[126] 28 U.S.C. §1331. *See* Sierra Club v. Marita, 769 F. Supp. 287, 289 n. 6 (E.D. Wis. 1991) (discussing federal court jurisdiction to review a challenge to the Forest Service's adoption of an LRMP).

[127] Cases involve contracts, ski areas, wilderness, timber, endangered species, water, grazing, mining, and oil/gas development. *See* Stephanie Parent, Student Comment, *The National Forest Management Act: Out of the Woods and Back to the Courts?*, 22 Envtl. L. 699, 712-728 (1992) (describing cases reviewing Forest Service decisions under the NFMA).

Forest Service strives to integrate the requirements of both laws.[128] The outcomes of judicial appeals commonly hinge on some combination of three issues: standing, supplementation of the administrative record, and standard of review.

A. Standing

Even though the federal judiciary has subject matter jurisdiction to review Forest Service actions, a person cannot bring an appeal to court without first establishing standing. Standing requires that a plaintiff have a personal, direct stake in the case.[129] Standing has become an increasingly difficult hurdle for environmentalists challenging federal agency actions since the Reagan Administration began litigating the issue vigorously. In 1990 the U.S. Supreme Court confirmed a trend in lower courts to require a more direct connection between an interest in the use of public lands and the challenged agency action.[130] Standing has both a constitutional and a statutory component.

The U.S. Constitution limits federal court jurisdiction to deciding cases and controversies.[131] This constitutional aspect of standing frequently is divided into three components: Injury in fact, causation, and redressability.[132] Injury in fact requires the plaintiff

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[128] Michael J. Gippert and Vincent L. DeWitte, Forest Plans: Gateway to Compliance with the National Forest Management Act, the National Environmental Policy Act and other Federal Environmental Laws (Sept. 3, 1990 revisions). For instance, both the NFMA and NEPA require public participation in many Forest Service decisions. The agency uses notice, opportunities for comment, and documentation of information to satisfy both laws.

[129] Sierra Club v. Morton, 405 U.S. 727 (1972) (standing is limited to plaintiffs with "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution"). A trade organization or environmental group can have standing only if it can point to individual members that have standing in their own right. Hunt v. Washington Apple Advertising Committee, 432, U.S. 333, 343 (1977) (establishing a three-part test for representational standing).

[130] Lujan v. Nation Wildlife Federation, 497 U.S. 871 (1990). *See* Karin Sheldon, NWF v. Lujan, *Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 Envtl. L. Rept'r. (Envtl. L. Inst.) 10557, 10557 (1990) (describing the trend in lower federal courts). The Supreme Court showed no sign of retreating from its posture on standing in its latest pronouncement, Defenders of Wildlife v. Lujan, 112 S.Ct. 2130 (1992).

[131] U.S. Const. art. III, §2.

[132] *See e.g.* Sierra Club v. Robertson, 764 F. Supp. 550 (W.D. Ark. 1991); Sheldon, *supra* note x, at y.

to show actual or threatened personal injury.[133] Causation requires that the injury be fairly traceable to the government action.[134] Finally, a plaintiff must show that the court can grant relief that will redress the injury.

Statutory standing applies more directly to the specific legal basis of the complaint. The NFMA, like NEPA, does not contain a citizen suit provision. Therefore, most appellants who seek judicial review rely on the Administrative Procedure Act (APA) for statutory standing to challenge Forest Service decisions.[135] The APA provides that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.[136]

In Lujan v. National Wildlife Federation, the U.S. Supreme Court interpreted this provision to impose two statutory standing requirements on a plaintiff.[137] First, the plaintiff must identify some specific agency action. For statutes such as NFMA and NEPA, which do not authorize review, the action must be a final agency action under the APA.[138] Second, the plaintiff must establish an injury that falls within the zone of interests "sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[139]

Federal courts have not consistently applied the confusing and overlapping elements of standing in cases involving review of Forest Service decisions. Statutory and constitutional requirements blend together in discussions of injury. The most difficult standing cases involve challenges to LRMPs. Even though the Forest Service permits administrative appeals, it argues that courts should not review approvals of forest plans because plaintiffs do not have standing.

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[133] Sierra Club v. Robertson, 764 F. Supp. 546, 550 (W.D. Ark. 1991) (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

[134] Idaho Conservation League v. Mumma, 22 ELR 20569, 20573 (9th Cir. 1992).

[135] 5 U.S.C. §702. Plaintiffs basing their claims on the Endangered Species Act or the Clean Water Act can secure statutory standing under the citizen suit provisions contained in those laws. 16 U.S.C §1540(g) and 33 U.S.C. §1365(a) respectively. However, they still must prove injury-in-fact. Defenders of Wildlife v. Lujan, 112 S.Ct. 2130 (1992).

[136] 5 U.S.C. §702.

[137] 110 S.Ct. 3177, 3185.

[138] 5 U.S.C. §704.

[139] 110 S.Ct. 3177, 3186.

Although the trend in the small group of LRMPs subjected to published judicial scrutiny is to grant standing,[140] recent Supreme Court standing decisions[141] may create problems for appellants seeking judicial review.

In appeals of both the Idaho Panhandle and the Flathead National Forest LRMPs, district courts in the Ninth Circuit initially held that plaintiffs did not have standing.[142] Without analyzing the issue according to the conventional categories described above, these courts found that because the LRMPs do not commit the agency to any future development, the plaintiffs' alleged injury was too remote to support standing.[143] Any future development activities, namely road-building and timber sales, would require site-specific analysis under NEPA.[144] Plaintiffs would have to wait until the project-level tier of decisionmaking to secure standing to challenge the agency in court.

These two LRMP decisions hinted at aspects of both the statutory and constitutional requirements in their brief discussions of standing. From the statutory perspective, because the LRMP does not bind the Forest Service to conduct the activities allowed in the plan, the LRMP may not be a final agency action for the purposes of APA review of NEPA and NFMA compliance. The constitutional problems arise because no injury-in-fact can occur if an agency has not actually committed to do anything. If the LRMP merely allows for the possibility of

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[140] Idaho Conservation League v. Mumma, 22 ELR 20569 (9th Cir. 1992) (Idaho Panhandle N.F. -- standing discussed and granted); Sierra Club v. Robertson, 764 F. Supp. 546 (W.D. Ark. 1991) (Ouachita N.F. -- standing discussed and granted); Sierra Club v. Cargill, (D. Colo 1989) (Bighorn N.F. -- court addressed merits without discussing standing); Citizens for Environmental Quality v. United States, 20 ELR 20403 (D. Colo. 1989) (Rio Grande N.F. -- court addressed merits without discussing standing); Griffin v. Yeutter, 20 ELR 20400 (S.D. Cal. 1989) (Cleveland N.F. -- court addressed merits without discussing standing). *But see* Resources Limited, Inc. v. Robertson (D. Mont. 1991) (Flathead N.F. -- standing discussed and denied).

[141] Defenders of Wildlife v. Lujan, 112 S.Ct. 2130 (1992); Lujan v. Nation Wildlife Federation, 497 U.S. 871 (1990).

[142] Idaho Conservation League v. Mumma, 21 ELR 20665 (D. Mont. 1990) (Idaho Panhandle National Forest LRMP appeal), *aff'd in part, rev'd in part,* 22 ELR 20569 (9th Cir. 1992); Resources Limited, Inc. v. Robertson, -- F. Supp. -- (D. Mont. 1991) (Flathead National Forest LRMP appeal). Both cases are pending appeals before the ninth circuit Court of Appeals.

[143] Idaho Conservation League at 20667-668; Resources Limited, Inc. at slip op. 9-10.

[144] The Idaho Conservation League court erroneously notes that the Forest Service "will again be required to prepare an EIS which is specific to the proposed development." The Forest Service frequently prepares only an environmental assessment for development activities, such as timber sales, and tiers it to the EIS prepared for the LRMP.

future development, as the Forest Service has alleged,[145] then adoption of the plan does not cause any harm until the Forest Service takes some further, reviewable implementation step.

On appeal, however, a divided Ninth Circuit panel reversed the Idaho Panhandle district court's finding on standing and put in question the Flathead court's decision as well.[146] Although it affirmed the Forest Service's victory on the merits, the circuit court used a constitutional analysis to hold that the plaintiff environmental groups did have standing to bring suit. First, the court found that the plaintiffs identified injury-in-fact even though the harm of the Forest Service's decision to permit logging in roadless areas was only potential, or contingent, in the sense that the LRMP did not itself authorize ground-disturbing activities. In discussing the constitutional injury-in-fact standard, the court incorporated the statutory zone of interest analysis from *Lujan v. National Wildlife Federation* in finding that Congress contemplated that an initial decision by the Forest Service not to protect a roadless area in a plan is an important step that can injure a citizen. The appeals court took the LRMP more seriously than the Forest Service in finding that programmatic authorization is an important enough process to cause injury-in-fact and warrant review.

The court also rejected the agency's argument that, like the *Lujan* plaintiffs, the appellants did not sufficiently specify a geographic location that was the location of the injury. In *Lujan*, the Court held that the plaintiffs' affidavits alleging use of areas in the vicinity of lands to be opened to mining was too generalized to allow a court to hear the case. The Idaho Panhandle court found that the naming of specific areas in the forest that plaintiffs visit and enjoy is sufficient to show a personal stake. Although the Idaho Panhandle plaintiffs could not predict which particular roadless areas would be developed, they did identify use of distinct areas that were unambiguously covered by the LRMP.

Second, the Idaho Panhandle court found that the plaintiffs met the causation and redressability prongs of the standing analysis despite the fact that development may never take place in the roadless areas zoned by the LRMP to permit logging. The alleged injury stemming from NEPA and NFMA violations is that the Forest Service overlooked environmental consequences of, and reasonable alternatives to, the LRMP selected. This injury is directly traceable to the adoption of the plan. Also, because third parties could not develop roadless areas but for the LRMP, the injury of potential physical development also is caused by the challenged decision. Under either theory, plaintiffs' injury would be remedied by reconsideration of the LRMP.

An Arkansas federal court reviewing the Ouachita National Forest LRMP foreshadowed the Ninth Circuit decision when it granted plaintiffs standing.[147] First, the court found that,

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[145] Idaho Conservation League, 21 ELR at 20667.

[146] Idaho Conservation League v. Mumma, 22 ELR 20569 (9th Cir. 1992).

[147] Sierra Club v. Robertson, 764 F. Supp. 546 (W.D. Ark. 1991).

unlike the land withdrawal review program challenged in *Lujan*, the LRMP was both a written document recognized by legislation and a prescriptive plan that establishes methods of land management. Therefore, it is a final agency action. Second, the court found that the plaintiffs were aggrieved because their affidavits detailed specific parts of the forest that might be managed in a way that would interfere with the plaintiffs' uses. This satisfies the other prong of the statutory standing test because the recreational and aesthetic interests that would be harmed are specifically referenced in NEPA and NFMA.[148]

The Ouachita court rejected the Forest Service's argument against constitutional standing. The agency maintained that, as a "programmatic statement of intent," the LRMP cannot cause the plaintiffs any direct, traceable harm.[149] The court found that the alleged injury was not too speculative because the LRMP specifically set out areas and methods for logging. The court did not wish to require a plaintiff who challenges these decisions to wait and appeal each project as it comes up.[150] With the Ninth Circuit reversal of the Idaho Panhandle district court finding on standing, the Flathead LRMP decision became the lone case where plaintiffs were denied standing for review of a forest plan.

Although plaintiffs can prove final agency action and injury-in-fact for specific project decisions more easily than for LRMPs, standing even in those situations is not automatic. In at least two cases involving project-level decisions, courts have denied standing for challenges based on violation of NFMA's limitation on below-cost timber sales. In both cases, the court found that plaintiffs had not demonstrated injury-in-fact because they did not have a personal stake in the outcome of the case.[151] The courts held that any injuries resulting from the Forest Service's violation of statutory or regulatory limitations on below-cost timber sales would affect all taxpayers equally and not specifically disadvantage the plaintiffs. Although the plaintiffs in these cases used land that might be adversely affected by the logging and roading proposed by the Forest Service, the courts found that these harms were not traceable to the fact that the timber sales lost money.

Current standing law narrows the range of forest management issues courts can address. This fact highlights an important role for administrative appeals. An administrative appeal is not always an intermediate step in a challenge to a Forest Service decision. In some cases, such as conflicts related to below-cost timber sales and possibly LRMPs, the administrative process will serve as the final forum for fulfilling appeal goals. Reform of the administrative appeals process will not affect judicial standing unless Congress amends the applicable statutes. Even then, the

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[148] 764 F. Supp. at 552.

[149] 764 F. Supp. at 550-551.

[150] 764 F. Supp. at 554-555.

[151] Churchwell v. Robertson, 748 F. Supp. 768 (D. Idaho 1990); Big Hole Ranchers Ass'n v. U.S. Forest Service, 686 F. Supp. 256 (D. Mont. 1988).

Article III constitutional restrictions will impede efforts to open up the courts for appeals of Forest Service decisions.

B. Supplementation of the Administrative Record

Challenges to Forest Service decisions are usually resolved by the courts on motions to dismiss or for summary judgment. District courts in these suits seldom take evidence.[152] What the court will consider in ruling on these motions is critical in determining which side will prevail. The Forest Service typically will seek to limit review to the administrative record that it compiled, which presumably supports its decision. The plaintiffs, whether industry or environmental groups, will seek to supplement the record to challenge agency assertions.

If the administrative record is incomplete, the correct remedy is to remand it to the agency.[153] However, a plaintiff may present evidence to supplement the record when:

1. matters were considered by the agency in rendering its decision but were omitted from the record, or

2. the agency so fails to explain its decision that its record frustrates effective judicial review.[154]

Courts are not consistent in applying this strict rule and are more likely to accept evidence in a NEPA challenge than in other APA review cases.[155] *Citizens for Environmental Quality v. United States* articulated the strict rule and then went on to allow admission of the affidavits introduced by the plaintiff to help the court understand the complex issues involved in the use of computer models in forest planning.[156] The court explained that the affidavits "illuminate the information contained in the administrative record," but did not explain why they fall within

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[152] Cronin v. U.S. Department of Agriculture, 21 ELR 20492 (7th Cir. 1990).

[153] Citizens for Environmental Quality v. United States, 20 ELR 20403, 407 (D. Colo. 1989).

[154] 20 ELR at 20407 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) and Friends of the Earth v. Hintz, 800 F.2d 822, 830 (9th Cir. 1986)).

[155] *See,* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 4:30 (1984, Supp.1991), and cases cited therein.

[156] 20 ELR at 20407.

one of the exceptions to the rule against supplementation.[157] The recent Ninth Circuit decision rejecting a challenge to the Idaho Panhandle LRMP considered similar affidavits.[158]

In contrast, the court reviewing an LRMP for the Nicolet National Forest refused to supplement the record with plaintiff's expert testimony on conservation biology.[159] The court rejected the plaintiff's argument that background scientific evidence should be admitted because it would assist judicial review. Quoting a Seventh Circuit opinion affirming a district court denial of a preliminary injunction against a timber sale, the Nicolet court limited extra-record testimony to those situations where there is "no record and no feasible method of requiring the agency to compile one in time to protect the objector's rights."[160] Similarly, an Arkansas federal court denied plaintiffs' request for a hearing to produce evidence to support their motion for a preliminary injunction against timber sales in the Ouachita National Forest.[161] The court observed that it was not as well equipped to "select, hear, digest, and weigh the relevant evidence" as trained agency specialists.[162]

This inconsistency among courts illustrates a problem that administrative appeal reform should help to solve. Courts are justifiably uncomfortable allowing clarifying affidavits to supplement the record for fear of opening the floodgates to a highly technical fact-finding procedure in a situation where the agency is entitled to deference on questions within its expertise. Nonetheless, courts are tempted to accept some testimony when they suspect that highly complex scientific or computer models obfuscate biases in the decisionmaking process. A reformed system of administrative appeals can differentiate aspects of Forest Service decisions based on social preferences from those based on natural science.

C. Standard of Review

A Forest Service decision usually receives deference from a court resolving a challenge to the agency's action. Courts apply the deferential APA review standard to ensure that Forest Service findings and decisions are not "arbitrary, capricious, an abuse of discretion, or otherwise

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[157] *Id.*

[158] Idaho Conservation League v. Mumma, n.22 (9th Cir. 1992).

[159] Sierra Club v. Marita, 769 F.Supp. 287 (E.D. Wis. 1991).

[160] Id. at 291 (quoting Cronin v. United States Department of Agriculture, 21 ELR 20492 (7th Cir. 1990)).

[161] Sierra Club v. Robertson, 784 F. Supp. 593 (W.D. Ark. 1991).

[162] *Id. at 601.*

not in accordance with law."[163] This minimal scrutiny highlights the difference between judicial review and administrative review, which can provide more sophisticated oversight by applying a more substantive standard of review.

In one of the most frequently cited statements of administrative law, the U.S. Supreme Court interprets the APA standard to require a court to determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[164]

It is not surprising then that courts seldom remand a Forest Service land management decision. More recently, the Supreme Court stressed the special importance of the deferential standard of review when the record is highly technical.[165] Courts tend to view Forest Service litigation as highly technical and will defer to the agency's decision as long as the record shows that the Forest Service considered the significance of all the available information.[166] In the NEPA context, this test requires that the agency take a "hard look" at the information.[167]

Idaho Conservation League v. Mumma,[168] the Idaho Panhandle National Forest LRMP case, is typical of the cases where a plaintiff could not overcome the deference afforded the agency. In that case, environmentalists charged that the Forest Service neglected to take the required "hard look" at alternatives to the adopted plan. The plaintiffs were particularly concerned that the agency did not consider meeting timber production goals while protecting all

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[163] 5 U.S.C. §706(2)(A).

[164] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, y (1971).

[165] Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) (deferring to agency's expert determination that new information relating to water quality did not require a supplemental environmental impact statement for a water development project). *See also* Chevron U.S.A., Inc. v. Natural Resources Defence Council, Inc., 467 U.S. 837 (1984).

[166] *See e.g.* Churchwell v. Robertson, 748 F. Supp. 768 (D. Idaho 1990) (citing Marsh, *id.*, and dismissing a challenge to timber sales where the Forest Service prepared a number of analyses addressing the issues that concerned the plaintiff).

[167] Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841 (D.C. Cir. 1970), *cert. den.* 401 U.S. 950 (1972); Sierra Club v. Robertson, 784 F. Supp. 593, 604 (W.D. Ark. 1991).

[168] 22 ELR 20569 (9th Cir. 1992).

existing roadless areas.[169] Like *Citizens for Environmental Quality*,[170] the dispute over alternatives centered on assumptions made by Forest Service computer models that filtered out the alternatives which plaintiffs wanted the agency to consider. Although the court indicated that it had considered the plaintiff's affidavits challenging the agency's computer model, the court explained that it is "not in a position to prefer [the plaintiffs'] view of the FS's software over the FS's explanation."[171] So long as the Forest Service can offer a rational explanation for narrowing the alternatives it considers, the courts will not entertain debates over the relative merits of computer program design.

In *Citizens for Environmental Quality*, the first judicial opinion reviewing an LRMP (for the Rio Grande NF), the court invoked the usual standards that guide review: APA section 706 and *Citizens to Preserve Overton Park*.[172] However, the court also observed that review of LRMPs is special because of "the technical complexity of the issues involved, and the possibility that years of costly research and planning may be undone in the event of a remand to the agency."[173] Despite the court's caution, it remanded to the agency parts of the LRMP decision that were not in compliance with the NFMA and NEPA.[174] The court's detailed treatment of several technical issues involved in forest planning demonstrated a willingness to conduct the searching analysis demanded by *Overton Park*. For instance, the court analyzed the Forest Service's interpretation of its own regulation implementing the NFMA's mandate to prevent irreversible damage to soil conditions.[175] The regulation prohibits designation of lands as suitable for timber production if technology is not available to ensure that productive use of the land can occur without irreversible damage to soils.[176] While agreeing with the agency's regulatory interpretation of the NFMA requirement, the court found that the Forest Service failed to comply with the regulation in this instance. The LRMP EIS simply stated that "there were

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[169] *Id. at 20570.*

[170] 20 ELR 20463 (D. Colo. 1989) (Rio Grande National Forest LRMP).

[171] *Id. at 20576.*

[172] 20 ELR at 20407.

[173] 20 ELR 20407.

[174] *See* Stephanie Parent, Student Comment, *The National Forest Management Act: Out of the Woods and Back to the Courts?*, 22 Envtl. L. 699, 720-724 (1992) (discussing the Rio Grande opinion in detail).

[175] 16 U.S.C. §1604(g)(3)(E)(i).

[176] 36 C.F.R. §219.14(a)(2).

no forested areas which were technologically unsuitable for timber production."[177] The court remanded the LRMP to the agency for more specific identification of the technology which would be used to conserve the soil. Still, for disputed issues where the plaintiffs submit affidavits challenging Forest Service planning assumptions, the court deferred to the agency, "particularly when a statute charges an agency with heavy analytical responsibilities but no indication as to how they should be performed."[178]

In two less complex situations, courts have remanded Forest Service decisions. In *Sierra Club v. Cargill,*[179] the district court found the Bighorn National Forest LRMP to violate NFMA's requirement that timber be harvested only where it can be restocked within five years.[180] The Forest Service had based the LRMP on a seven year restocking period for those areas where restocking within five years was theoretically technologically feasible. In *Seattle Audubon Society v. Evans*, the Ninth Circuit upheld a district court injunction against timber sales in spotted owl habitat until the Forest Service promulgated standards and guidelines to ensure the bird's viability.[181] The Forest Service implements the NFMA mandate to provide for biological diversity[182] partially through its regulation requiring that it "maintain viable populations of existing native and desired non-native" vertebrates.[183] The appeals court held that the agency continues to be bound by the diversity requirement[184] even after an animal is protected under the Endangered Species Act. Forest Service regulations implement the statutory mandate by requiring maintenance of "viable populations" of most animals.[185] After the agency submitted a plan to protect the owl, the same district court again issued an injunction because the Forest Service failed to consider important new information that showed owl populations to be more vulnerable than originally thought.[186]

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[177] 20 ELR at 20408.

[178] 20 ELR at 20410.

[179] 732 F. Supp. 1095 (D. Colo. 1990).

[180] 16 U.S.C. §1604(g)(3)(E)(ii).

[181] 952 F.2d 297 (9th Cir. 1991), affirming 771 F. Supp. 1081 (W.D. Wash. 1991).

[182] 16 U.S.C. §1604(g)(3)(B).

[183] 36 C.F.R. §219.19.

[184] 16 U.S.C. §1604(g)(3(B).

[185] 36 C.F.R. §219.19

[186] July 2, 1992.

The Rio Grande, Bighorn, and spotted owl cases are important to understand what decisions courts will consider "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[187] Plaintiffs challenging Forest Service decisions have had greatest success using the narrowest, most explicit NFMA provisions. The broader sustainability mandate of the NFMA and other laws lies outside judicial review despite its importance to environmental plaintiffs. Although courts will not always defer to the Forest Service, the review they offer cannot replace the more searching inquiry that is possible during an administrative appeal.

IV. SUSTAINABILITY AND A BOARD OF FOREST APPEALS

Any proposal to improve administrative appeals within the Forest Service should be judged by the extent to which it promotes accuracy, efficiency, and acceptability.[188] Administrative appeals not only can catch technical mistakes and obvious violations of law, but also can ensure that the agency fulfills its responsibility to the public, to future generations, and to the forests themselves. As trustee for more than 187 million acres of land,[189] the Forest Service should be held to the highest standards of excellence.

An improved appeals system requires reform of both substance and procedure. The debate over forest appeals has focused almost entirely on procedure. Appeals regulations typically establish carefully thought-out rules for standing, notice, argument, intervention, and other procedural elements. However, attention to the substantive standard of review is disproportionally small. To go no further than to say that a review should evaluate the "correctness" of a decision is akin to designing a procedure that says nothing more than appeals should be decided efficiently.

To neglect the substantive side of the appeals equation is to skirt a key question for an appeals process. Many appeals are, at heart, about the appellant's substantive disagreement over the Forest Service's implementation of management mandates. Appeals that do not evaluate the proposed decision as an application of federal resource management law and policy, do not address the real grievances of appellants. Due process in appeals is an empty promise without a substantive review. This part describes the substantive sustainability principle and the procedural elements of an independent review board that would best address the difficult issues relating to appeals.

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[187] 5 U.S.C. §706(2)(A).

[188] Cramton, *supra*, at 112.

[189] United States Council on Environmental Quality, Environmental Quality: The Twenty-Second Annual Report of the Council on Environmental Quality 308 (1992) (table showing 156 national forests managed by the Forest Service totalling 187.08 million acres).

A. The Substantive Standard of Review

The current administrative appeals system creates a very informal system of supervisory review -- one that lacks clear substantive principles for appeal decisions and gives reviewing officers wide discretion in scrutinizing the actions of their subordinates. It is little wonder that appellants complain about not knowing what sorts of claims to appeal, and the Forest Service complains about being saddled with overbroad appeals.

The Forest Service should decide administrative appeals using a set of clear substantive requirements that reflect the agency's management goals. Under the 1983 version of the appeals rules, reviewing officers were to "apply independent judgment and decide, based on the record, whether the deciding officer made a correct decision."[190] Though "correctness" may appear to be a strict standard of review, it certainly begs the question of what factors make a decision "correct." The current (1989) appeals rule fails to provide any standard of review.[191] Moreover, the current rule does not specify the form to be used in making an appeal, does not require deciding officers to explain their reasons for affirming or reversing a decision, and does not create a system for publicly reporting and indexing appeal decisions.

This section reviews the federal legislation that sets the foundation of national forest management. This legislation defines management goals and provides the basis for a substantive administrative review standard. Besides providing specific checks on Forest Service discretion, the legislation reflects an evolution toward a management regime guided by the principles of sustained yield, or sustainability. A coherent substantive standard of review for administrative appeals must derive from the principle of sustainability, portions of which are currently applied only piecemeal.

Sustainability has recently achieved status as the most commonly invoked buzzword in environmental policy. The 1987 World [Brundtland] Commission on Environment and Development defined development as sustainable if it "meets the needs of the present without compromising the ability of future generations to meet their own needs."[192] Five years and one major international summit later, progress in demonstrating sustainable management has been slight. During the United Nations Conference on the Environment and Development (the Rio Summit), the United States pledged hundreds of millions of dollars for international forest protection. Demonstrating sustainability on its own public forest lands may be a more significant contribution.

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[190] Appeals Handbook § 2.94.

[191] The rule merely specifies that the disposition of the appeal be consistent with applicable law, regulations, and orders. 36 C.F.R. § 217.16(c).

[192] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 8 (1987).

1. The Early Legislation and the Rise of the Pinchot Ethos.

The starting point for any analysis of the Forest Service's legal authority, the Organic Act of 1897,[193] sets forth the purposes for which forest reserves (renamed "national forests" in 1907) can be set aside.[194] According to this act, forest reserves cannot be established "except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ."[195] Thus the Organic Act identified three purposes for establishing national forests: (1) improving and protecting the forest; (2) maintaining watersheds; and (3) furnishing a "continuous supply" of timber to the nation. The Organic Act also established broad authority to protect the forests reserves from "depredations," preserve the forests from destruction, and regulate use and occupancy of the forest reserves.[196]

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[193] Act of June 4, 1897, ch. 2, 30 Stat. 34-36 (codified as amended at 16 U.S.C. §§ 473-482, 551.

[194] An earlier statute, the Creative Act of 1891, gave the President the authority to reserve by proclamation public lands "wholly or in part covered with timber or undergrowth, whether or commercial value or not . . . as public reservations." Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1103, 16 U.S.C. § 471, *repealed by* the Federal Land Policy and Management Act of 1976, § 704(a), Pub. Law. No.94-579, 90 Stat. 2743, 2792. Section 24 of the Creative Act provided:

> That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

Within a month of enactment, President Harrison had established the Yellowstone Park Forest Reserve. Within two years, he had established 14 other reserves totalling 13 million acres. S. DANA, FOREST AND RANGE POLICY 102 (1956).

[195] 16 U.S.C. § 475.

[196] The Organic Act provides:

> The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . . Ch. 2, 30 Stat. 35 (codified at 16 U.S.C. § 551).

Originally controlled by the General Land Office in the Department of Interior, the forest reserves were transferred to the authority of the Department of Agriculture's Division of Forestry (soon renamed the Forest Service), under the direction of Gifford Pinchot, in 1905. Transfer Act of Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628 (codified at 16 U.S.C. § 472)

While the Organic Act specified the reasons for establishing forest reserves, it provided little guidance as to how the agency should exercise its discretion once a reserve had been established. The statute was an extremely broad delegation of power, inviting the agency, in the Supreme Court's words, to "fill up the details" with its own regulations.[197] As Professor Wilkinson has written, "[t]he 1897 Act was a blank check, made out to the Forest Service, to manage these lands as it saw best."[198] Soon the agency had stepped into the statutory void, first in a famous letter in which Gifford Pinchot spelled out the new agency's mission upon transfer to the Department of Agriculture,[199] and later in the Forest Service's early bible, the *Use Book* of 1907.[200] Both the Pinchot Letter and the *Use Book* made one point very clearly: the national forests were to be managed principally for timber production -- "for the benefit of the home-builder first of all," the Pinchot Letter said,[201] and "chiefly for the production of timber and wood," according to the *Use Book*.[202]

Before the post-war boom in lumber demand, the nation's timber supply came primarily from privately-held stocks,[203] and use of the national forests for timber and other purposes

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In a landmark 1911 ruling, the Supreme Court endorsed the agency's broad powers "to regulate the occupancy and use and to preserve the forests from destruction." United States v. Grimaud, 220 U.S. 506, 522 (1911). Since the *Grimaud* decision, lower courts have consistently upheld the agency's authority to regulate and manage national forests under the "occupancy and use" language of the Organic Act. *See* C. WILKINSON & H. ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 52-60 (1987) (discussing cases).

[197] United States v. Grimaud, 220 U.S. 506, 517 (1911).

[198] Wilkinson, *The Forest Service: A Call for a Return to First Principles*, 5 Pub. Land L. Rev. 1, 7 (1984).

[199] Although written by Pinchot, the letter was actually sent *to* Pinchot from the Secretary of Agriculture on the day the forest reserves were transferred from the Department of Interior to the Department of Agriculture. Pinchot later wrote "[t]he letter, it goes without saying, I had brought to the Secretary for his signature . . . ." G. PINCHOT, BREAKING NEW GROUND 261-62 (1947).

[200] U.S. DEPT. OF AGRICULTURE, FOREST SERVICE, THE USE OF THE NATIONAL FORESTS (1907).

[201] Pinchot Letter, *quoted in* G. PINCHOT, BREAKING NEW GROUND at 261-61.

[202] U.S. DEPT. OF AGRICULTURE, FOREST SERVICE, THE USE OF THE NATIONAL FORESTS, at 17.

[203] Before the 1920s, for example, national forest lands were used more for livestock grazing than for timber production. *See* CONGRESSIONAL RESEARCH SERVICE, U.S. LIBRARY

remained at low levels. Where conflicts over the use of forest resources occurred, they could be resolved fairly easily by segregating uses. In this era, the activities of the Forest Service went largely unchecked by public or Congressional scrutiny, and the agency was viewed as an exemplar of administrative excellence which needed, and deserved, little oversight.

During these first five decades, the Forest Service developed an ethos[204] of technical expertise, independence, and decentralization that to this day typifies the agency's view of its mission and essential character. This ethos, as much as the early legislation, guided the agency's behavior. Above all, the Forest Service was an agency of *foresters*, experts in the science of wise timber management, a science passed down from the first professional foresters of Europe, to their American protege, Gifford Pinchot, to every forest ranger.[205] Forestry in this tradition was a practical agricultural science -- "tree farming," to use Pinchot's words.[206] To find the true personification of the Forest Service ethos, one looked not to Washington, D.C., headquarters but to the lone district ranger who exemplified the traditional values of technical competence, independent judgment, and commitment to the needs of the local forest, its users and nearby residents. In his study, *The Forest Ranger*, Herbert Kaufman observed:

> When a ranger takes over a new district, he is generally invited promptly to join local, civic and community organizations -- partly because his position as manager of large properties automatically makes him a person of some standing in most localities, partly because the Forest Service is always "represented" in such associations. It is with the rangers that loggers, ranchers, picnickers, and permittees of all kinds do business -- both in negotiating agreements with the Forest Service, and when the agreements are supervised. The rangers are therefore shown considerable deference. The rangers are cast in the role of law

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OF CONGRESS, NATIONAL FOREST RECEIPTS: SOURCES AND DISPOSITIONS, 89-284 ENR (1989).

[204] An "ethos" can be defined as "the fundamental character or spirit of a culture; the underlying sentiment that informs the beliefs, customs, or practices of a group or society; dominant assumptions of a people or period." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 666 (2d ed. 1987).

[205] Practically every Forest Service Chief, starting with Pinchot, has been a professional forester by training. *See* G. ROBINSON, THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT 28 (1975).

[206] Forestry is tree farming. . . . To grow trees as a crop is forestry. Trees may be grown as a crop just as corn may be grown as a crop. The farmer gets crop after crop of corn, oats, wheat, cotton, tobacco, and hay from his farm. The forester gets crop after crop of logs, cordwood, shingles, poles, or railroad ties from his forest, and even some return from regulated grazing.
PINCHOT, BREAKING NEW GROUND, at 31.

enforcement officers when trespasses occur; to violators, they often appear, and are treated, as figures of authority. Men engaged for emergency fire fighting see them as fire bosses in full charge of complicated and dangerous operations. They appear before school and college groups, associations of young people (4-H Clubs, Future Farmers of America, etc.), garden clubs, hunting and fishing clubs, and similar groups in fulfillment of their information and education responsibilities (especially for fire prevention purposes). To many local residents, they are employers who provide seasonal employment. In business circles, they appear as executives managing tens -- even hundreds -- of thousands of acres of valuable land worth millions of dollars and doing thousands of dollars worth of business every year. For most people, in short, they stand for the Forest Service; indeed, they personify the Forest Service. The role is thrust upon them.[207]

2. The Conflicts of the Modern Era.

The Pinchot ethos of wise, decentralized forest management was the driving force behind the Forest Service's reputation for excellence, a reputation which the agency enjoyed for at least the first two generations of its existence. But the conditions that enabled this ethos to flourish began to erode after the World War II. Responding to the rising demand for forest products in the post-war years, American timber and paper companies increasingly relied on the national forests as their primary sources of wood.[208] The demand for recreation on national forest lands also skyrocketed, increasing by a factor of 25 between 1945 and the present.[209] Recent years have also witnessed a steady strengthening in American preservation values, with greater sensitivity to the importance of ecosystem and species diversity, and the preservation of the remaining, uncut forests and roadless areas.

In their combined effect, these developments have made it impossible for the Forest Service to conduct business as it did under Pinchot and his successors. The agency can no longer justify its decisions on neutral scientific principles, but must unavoidably confront dilemmas that cannot be resolved without infuriating one or several constituencies. Today the agency must make judgments that rest, at least partly, on factors that are unscientific, politically charged, and laden with values.

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[207] H. KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR 194 (1960).

[208] Timber harvests from national forests averaged less than one billion board feet (BBF) a year before World War II. In 1950, this number had risen to 3.5 BBF, and by 1966 it had reached 12.1 BBF. Annual timber harvests have largely stabilized, averaging between 9 and 13 BBF since the 1960s. OTA Report at 36.

[209] *Id.* at 37.

The Forest Service has had a hard time coming to grips with its new role. Despite two decades of turmoil over public lands policy, and the fact that the agency's political independence has eroded significantly,[210] the Forest Service still professes to follow the ethos of the Pinchot era. It seeks public participation less to involve citizens in decisions affecting public forests than simply to gather data and points of view that will assist it in exercising its expertise and independent judgment. The agency merely "listens" before acting. The Forest Service views administrative appeals narrowly as an "extension" of this form of public participation, not as a forum for concerned parties to test the agency's decisions.

3. *The Sustainability Principle in Modern Legislation.*

While the turn-of-the-century legislation granted broad discretion to the Forest Service and fostered the agency's status as an independent expert insulated from scrutiny, more recent statutes, especially the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), NEPA, and NFMA, have imposed constraints on the agency's authority. Although there continue to be tensions within the Forest Service's mandate, the evolution of statutory law continues to point in the direction of sustainable resource management, one of the founding innovations of the forest reserves. Reform of the administrative appeals system should reinvigorate the sustainability principle and give it practical application. An analysis of the important statutes provides some specific benchmarks of sustainability against which appealed decisions should be measured.

a. *MUSYA.*

By the mid-1950s, the Forest Service faced increasing pressure from several quarters. Ranchers, timber companies, and wilderness defenders all championed their causes before the agency and Congress. The Park Service, which had grown by carving a number of parks out of national forest lands, launched a highly visible program, supported by President Eisenhower, to further expand its domain.[211] Confronted with these threats to its independence, the Forest

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[210] Although the Forest Service has been located in the Department of Agriculture since 1905, until recently it exercised a remarkable degree of autonomy and independence, with the Chief of the Forest Service (a nonpartisan appointee who typically remains in office during a change of administration) having the last word on agency policy, rather than the Secretary of Agriculture. This level of autonomy, unique in the federal government, began to break down as successive Assistant Secretaries, M. Rupert Cutler under President Carter and John Crowell under President Reagan, wielded increasing clout over Forest Service policy. *See* Wilkinson, *The Forest Service: A Call for a Return to First Principles*, 5 Pub. Land L. Rev. 1, 26 (1984). The recent proposal to scrap administrative appeals of timber sales -- initiated as part of President Bush's 1992 deregulatory campaign -- may represent the ultimate politicization of the Forest Service. It is perhaps more accurate to call it an "Administration proposal" than a "Forest Service" proposal.

[211] For discussion of the pressures leading to the enactment of the MUSYA, see S. DANA & S. FAIRFAX, FOREST AND RANGE POLICY 179-201 (2d e. 1980).

Service sought legislative endorsement of its authority under the Organic Act, and in February 1960 the Department of Agriculture submitted a multiple-use bill to Congress.[212] The bill generated little controversy because it appeared to many observers as merely giving formal recognition of the agency's existing power. Virtually unopposed, the bill was quickly passed by Congress.[213] Congress declared its policy to manage the national forests for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[214] The MUSYA directs the Forest Service to "administer the renewable surface resources of the national forests for multiple use and sustained yield . . .."[215]

This multiple use directive provides few concrete limits on the agency's discretion. The act defines multiple use as "the management of all the various surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people . . . and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."[216] While the multiple use directive has enabled the agency to defend challenges to its regulatory authority in particular cases,[217] this aspect of the act, as one Court of Appeals put it, "breathe[s] discretion at every pore."[218] At most, the multiple use requirement demands that the agency consider multiple use values in making a decision. But as even a cursory examination of the literature reveals, "multiple use" can be cited to justify practically anything.[219]

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[212] C. WILKINSON & H. ANDERSON, *supra*, at 60.

[213] *Id.* at 61-62.

[214] 16 U.S.C. § 528.

[215] *Id.* §§ 529.

[216] *Id.* § 531(a).

[217] *See, e.g.*, McMichael v. United States, 355 F.2d 283, 285 (9th Cir. 1965) (upholding agency's power under the MUSYA to prohibit use of motorized vehicles in "primitive area" designated by agency).

[218] Perkins v. Bergland, 608 F.2d 803, 806-07 (9th Cir. 1979).

[219] As the OTA Report explained,

> "[M]ultiple use" has multiple interpretations, meaning different things to different people. To some, multiple use necessarily includes use of commodity resources (timber, livestock, forage, minerals). Areas where such uses are proscribed, such as recreation sites and wilderness areas, therefore are not considered multiple-use areas. However, others have noted that such areas still yield water and are used for recreation and by wildlife, while clearcuts effectively eliminate recreation use of the harvest site, at least temporarily. It is unclear which uses or how many

The definition of "sustained yield," however, more clearly limits the agency's authority. The act defines sustained yield as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land."[220] The Forest Service had long attempted to manage timber for continuous production, and "sustained yield" of timber was perhaps the cornerstone of Gifford Pinchot's approach to scientific forestry.[221] Yet in the MUSYA Congress recognized for the first time that all renewable resources, not just timber, must be managed on a sustainable basis. According to some commentators, the application of the sustained yield concept to all resources was the most important reason for the passage of the MUSYA.[222] However, the agency has never seriously abided by this sustained yield constraint and courts have not enforced it without supporting authority from other statutes.[223]

b. *NEPA*.

NEPA also requires that the Forest Service manage its lands sustainably. NEPA's chief legacy has been procedural because the courts have not enforced the substantive language of the act.[224] Nonetheless, Congress did impose substantive responsibilities particularly relevant to national forest management.

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uses are necessary for an area to be managed under multiple use.
OTA Report at 45-46.

[220] 16 U.S.C. § 531(b).

[221] *See* Wolf, *National Forest Timber Sales and the Legacy of Gifford Pinchot: Managing a Forest and Making it Pay*, 60 U. Colo. L. Rev. 1037 (1989).

[222] *See* OTA Report at 47; Crafts, *The Saga of a Law: Part I*, 76 American Forests 12 (1970).

[223] *See* GEORGE C. COGGINS, PUBLIC NATURAL RESOURCES LAW § 1602[2] (observing that no court has remanded an resource management decision solely because of MUSYA limitations). Coggins notes, however, that recent court opinions show a trend toward deeper analysis of multiple use, sustained yield requirements in reviewing agency actions. *Id.* (citing Headwaters, Inc. v. Bureau of Land Management, 684 F. Supp. 1053 (D. Or. 1988), *vacated as moot*, 893 F.2d 1012 (9th Cir. 1989) (challenge to BLM logging decision); National Wildlife Federation v. United States Forest Serv., 592 F. Supp. 931 (D. Or. 1984), *appeal dismissed as moot*, 801 F.2d 360 (9th Cir. 1987) (Mapleton litigation challenging logging)).

[224] For discussion, see Yost, *NEPA's Promise -- Partially Fulfilled*, 20 Envtl. L. 533 (1990) (arguing that the Supreme Court's minimization of substantive review contradicts the drafter's intent, the statute's language, and the Council of Environmental Quality's implementing regulations).

Subsection 101(a) of NEPA announces a congressional declaration "that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . [to] fulfill the social, economic, and other requirements of present and future generations of Americans."[225] To implement this sustainability principle, subsection 101(b) places an ongoing responsibility on all federal agencies to "improve and coordinate" their "plans, functions, programs, and resources" so that the nation can:

> fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; . . . attain the widest range of beneficial uses of the environment without degradation, . . . preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; and . . . enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[226]

Subsection 102(1) makes it clear that these directives are not merely hortatory statements of policy -- they must be implemented by federal agencies "to the fullest extent possible . . . ."[227] The Constitution gives Congress responsibility for public land management in the property clause.[228] The Forest Service, therefore, must manage its lands according to the principles set by Congress. The substantive aspects of NEPA must guide agency decisionmaking regardless of what the courts may or may not be capable of enforcing. Statutes, in addition to court decisions, define an agency's responsibilities. Appeals standards should reflect NEPA's goals.

c. *NFMA*.

The initial spark behind NFMA was a 1975 Court of Appeals decision upholding an injunction against clearcutting on the Monongahela National Forest based on the timber sale

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[225] 42 U.S.C. § 4331(a).

[226] 42 U.S.C. § 4331(b)(1),(3),(4),(6).

[227] 42 U.S.C. § 4332(1). As NEPA's chief sponsor in the Senate explained,

> A statement of environmental policy is more than a statement of what we believe as a people and as a Nation. It establishes priorities and gives expression to our national goals and aspirations. It provides a statutory foundation to which administrators may refer . . . for guidance in making decisions which find environmental values in conflict with other values.

115 Cong. Rec. 40,416 (1969) (remarks of Senator Jackson).

[228] U.S. CONST. art IV, §3.

provisions of the Organic Act of 1897.[229] Rather than simply remove the troublesome language of the Organic Act, as some bills had proposed, Congress took the opportunity to make wholesale changes in the Forest Service's land management and planning authority. The resulting law imposed new, forest-specific planning requirements, new standards for public participation in agency decisionmaking, and new guidelines for forest management.

NFMA codified the agency's non-declining even flow (NDEF) policy of timber management to ensure sustained yield.[230] Voluntarily adopted by the Forest Service in the early 1970s, the NDEF policy limits annual timber harvests to "a quantity equal to or less than a quantity than can be removed in perpetuity on a sustained-yield basis."[231] The statute limits the quantity of timber allowed to be harvested to the NDEF level unless the agency permits a departure under certain circumstances defined in the act.[232]

The NFMA also requires the agency to adopt regulations advancing a number of specific management goals. The agency must protect the diversity of plant and animal communities and preserve the diversity of tree species.[233] It must provide research and evaluation of management systems to insure that they "will not produce substantial and permanent impairment of the productivity of the land."[234] It must specify that increases in timber harvest levels based on intensified management practices, such as tree thinning and reforestation, are permissible only if such practices can be implemented in accordance with the MUSYA and the increased harvest levels are decreased at the end of each planning period if the practices cannot be implemented or if funds supporting these activities are not received.[235] It must allow timber harvesting only on lands where "soil, slope, or other watershed conditions will not be irreversibly damaged," and

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[229] West Virginia Div. of the Izaak Walton League of Am. v. Butz, 522 F.2d 945 (4th Cir. 1975). The Organic Act on its face permitted harvesting only of "dead, matured, or large growth of trees" that had been "marked and designated" before sale.

[230] *See* 16 U.S.C. § 1611(a).

[231] *Id.*

[232] The agency may depart from the rigors of NDEF when the departure is "consistent with the multiple-use management objectives" of the forest plan, and made with public participation requirements of 16 U.S.C. § 1604(d). 16 U.S.C. § 1611(a). In addition, the agency may depart from NDEF limitations to allow "harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack." *Id.* § 1611(b).

[233] 16 U.S.C § 1604(g)(3)(B).

[234] *Id.* § 1604(g)(3)(C).

[235] *Id.* § 1604(g)(3)(D).

where there is "assurance that such lands can be restocked within 5 years."[236] It must protect "streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes" due to timber harvesting, such as changes in water temperature, blockages of water course, and sedimentation.[237] It must insure that the timber harvesting method chosen "is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber."[238] It must allow clearcutting only where it is determined to be the "optimum method" of meeting the requirements of the applicable forest plan, and where an interdisciplinary review has been completed and the potential environmental, biological, aesthetic, engineering, and economic impacts of each sale have been assessed.[239] And it must establish "maximum size limits for areas to be cut in one harvest operation" based on geographical areas, forest types and other classifications.[240] These limits on Forest Service discretion are far more specific than

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[236] *Id.* § 1604(g)(3)(E)(i)&(ii).

[237] *Id.* § 1604(g)(3)(E)(iii).

[238] *Id.* § 1604(g)(3)(E)(iv).

[239] *Id.* § 1604(g)(3)(F)(i)&(ii).

[240] 16 U.S.C. § 1604(g)(3)(F)(iv). In implementing these provisions of NFMA, the Forest Service regulations identify 14 principles to guide regional and forest planning:

> (1) Establishment of goals and objectives for multiple-use and sustained-yield management of renewable resources without impairment of the productivity of the land;
>
> (2) Consideration of the relative values of all renewable resources, including the relationship of nonrenewable resources, such as minerals, to renewable resources;
>
> (3) Recognition that the National Forests are ecosystems and their management for goods and services requires an awareness and consideration of the interrelationships among plants, animals, soil, water, air, and other environmental factors within such ecosystems;
>
> (4) Protection and, where appropriate, improvement of the quality of renewable resources;
>
> (5) Preservation of important historical, cultural, and natural aspects of our national heritage;
>
> (6) Protection and preservation of the inherent right of freedom of American Indians to believe, express, and exercise their traditional religions;
>
> (7) Provision for the safe use and enjoyment of the forest resources by the public;
>
> (8) Protection, through ecologically compatible means, of all forest and rangeland resources from depredations by forest and rangeland pests;
>
> (9) Coordination with the land and resource planning efforts of other

those imposed by other laws affecting the agency.

d. *Other Laws.*

Forest Service discretion is limited by other environmental laws that bolster the sustainability mandate. For instance, the Clean Water Act seeks "to restore and maintain the chemical, physical, and biological integrity of the Nations's waters."[241] In conducting its planning and management, the Forest Service must comply with standard setting and permitting programs.[242] In particular, the agency must meet state nonpoint source protection practices, maintain state water quality standards, and secure permits for dredge or fill activities. Another important environmental law is the Endangered Species Act, which is designed to conserve ecosystems on which threatened and endangered species depend.[243] The Forest Service must contribute to this mandate under the Act's section 7(a)(1) duty to conserve.[244] In addition, the agency must avoid both harming listed species and jeopardizing their continued existence.[245] The Wilderness Act and Wild and Scenic Rivers Act also set standards that seek to maintain long-term environmental quality. All these authorities should be incorporated in the sustainability principle, along with the specific management limitations of NFMA.

> Federal agencies, State and local governments, and Indian tribes;
>
> (10) Use of a systematic, interdisciplinary approach to ensure coordination and integration of planning activities for multiple-use management;
>
> (11) Early and frequent public participation;
>
> (12) Establishment of quantitative and qualitative standards and guidelines for land and resource planning and management;
>
> (13) Management of National Forest System lands in a manner that is sensitive to economic efficiency; and
>
> (14) Responsiveness to changing conditions of land and other resources and to changing social and economic demands of the American people.

36 C.F.R. § 219.1(b).

[241] 33 U.S.C. § 1251(a).

[242] 33 U.S.C. § 1323.

[243] 16 U.S.C. § 1531(b).

[244] 16 U.S.C. § 1536(a)(1).

[245] 16 U.S.C. §§ 1538 and 1536(a)(2). Harm to a species includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." Palila v. Havaii Dept. of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981); 852 F.2d 1106 (9th Cir. 1988). The Forest Service has run afoul of its duty not to harm endangered red-cockaded woodpeckers by allowing habitat modification through timber management. Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991).

4. *Application of the Sustainability Principle*

In combination, the MUSYA, NEPA, and NFMA establish a foundation for what can be called a "sustainability principle" for Forest Service decisionmaking. This sustainability principle prohibits the agency from approving actions on national forest lands that impair the long-term integrity of the resource base. It applies to timber, as well as all other renewable and biological resources managed by the Forest Service.

The Forest Service currently endeavors to achieve compliance with the specific requirements imposed by federal legislation. But, it has not developed the overarching mandate to ensure resource sustainability nearly as much as it has the technical requirements of the law. This is, to some extent, understandable because courts create stronger incentives to comply with the more easily enforceable, technical mandates. However, the Forest Service itself ought to be able to incorporate the concept of sustainability into all of its management practices. An appeals process that evaluates specific cases based on this broader sustainability principle will give form to the currently skeletal theory.

Current trends in judicial review will not soon lead to enforcement of the broader implications of the sustainability principle. This is a choice for the Forest Service to make as an innovation to improve its stewardship of public resources and to more closely comply with the management regime created by federal statutes.

A great difficulty in applying current federal law to National Forest System management is the conflicting mandates within statutes, such as the multiple uses the Forest Service must support, and between statutes, such as timber targets in appropriations bills and environmental laws. The sustainability principle itself embodies these inherent tensions in federal forest management: how to serve some users without unfairly narrowing options for other (possibly future) users. No amount of rulemaking, linear programming, or public participation will make the resource management conflicts go away. However, explicit use of sustainability as a principle of review will channel controversy over specific projects and plans into a common language. Over time, the resolution of appeals in this language will provide precedents that speak directly to management concerns and that can be used practically to shape future decisions.

The Forest Service certainly has the discretion to adopt policies for resource management. It should continue to do this through rulemaking. However, failure to map the contours of sustainability in regulation does not diminish the importance of the principle. Appellate review should examine the application of regulations and statutory provisions to particular situations. Like policymaking through rules, a body of precedent growing out of the appeals system we propose will guide future management decisions. However, unlike a rule-based approach, appeals decisions are limited to the particular dispute at hand and allow for more specific, geographically based explanation of sustainability. We in the natural resources field have been frustrated by attempt to define prescriptive rules for sustainability. It is time for a new approach, an applied

exegesis of management, that deepens the sustainability principle through case examples.[246]

At the threshold of a new century, we find ourselves with a more sophisticated (though still incomplete) understanding of the biological integrity that must be maintained if yields of goods on public lands are to be sustainable. In 1897, public land management reflected the era's understanding of nature with a regime that conserved timber and watersheds. In the 1930s and 1940s, the same principles of "multiple use, sustained yield" met the emerging concerns for preserving an element of primitiveness on the public lands. The 1960 statute formally established outdoor recreation, fish and wildlife as forest resource management concerns. Now is the perfect opportunity for the Forest Service to revise its application of "multiple use, sustained yield" management so that it again reflects current social and scientific concerns such as global warming and biological diversity.[247] A Forest Service appeals system that provides for systematic application of the sustainability principle in reviewing development and planning decisions will enable the agency to meet its Congressional mandate through practical application of principles to particular cases.

B. Procedural Elements of a New Appeals System: A Forest Appeals Board

A new model for Forest Service appeals designed to advance the goals of accuracy, efficiency, and acceptability needs to be concerned with process as well as substance. Procedural rules govern how principles will be applied in particular instances and often determine outcomes. This section describes the procedural elements of our new appeals model, which calls for the creation of an independent forest appeals board. After this mostly descriptive section, we will analyze the strengths and weaknesses of the new model. Table 1, at the conclusion of this report, summarizes the procedural elements of the model in comparison with other systems.

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[246] Professor David Ehrenfeld makes an analogous argument with respect to ecosystem management, which he calls the conservation paradox: "Active management needs rules; rules are based on generalities, simplifications, and assumptions; and generality is often the enemy of specificity, which is the same as diversity." Ehrenfeld, *The Management of Diversity: A Conservation Paradox*, in Ecology, Economics, Ethics: The Broken Circle 26, 31 (F.H. Bormann and S.R. Kellert eds. 1991). Ecosystem operation is, like sustainable development, incomprehensibly complex due to myriad interdependent components. Ehrenfeld recommends "loose coupling" of management decisions rather than formal, central rules. *Id.* at 38. Although an extreme application would be no oversight of forest supervisor decisions, an appellate board resolves the tension between ensuring that decisions are consistent with sustainable objectives and allowing local conditions to guide application.

[247] The NFMA planning regulations provide for "[r]esponsiveness to changing conditions of land and other resources and to changing social and economic demands of the American people." 36 C.F.R. §219.1(b)(14).

1. *Coverage.*

The new appeals system would be available to holders of written instruments authorizing use and occupancy of national forest lands as well as to members of the general public, and would cover decisions at both the plan and project levels. Hence the coverage of the new appeals system would be identical to that of the 1983 rules (Part 211), and it would apply to disputes currently resolved under the separate procedures of Parts 217 (as modified by the 1993 Appropriations Act appeals provision) and 251.[248] Likewise, exclusions from the new appeals system would be identical to those under the 1983 rules, such as decisions appealable to the Agricultural Board of Contract Appeals.[249]

The decision to bifurcate the appeals system in the 1989 revisions was based on the agency's view that disputes involving written instruments were "grievances" that were "adjudicatory" in nature, thus demanding a certain quantum of due process under the APA, while disputes involving decisions contested by members of the public were merely a continuation of "public participation" process, demanding nothing from the APA.[250] This reasoning ignores the fact that when ordinary forest users bring appeals before the Forest Service they present grievances with as much foundation in law as claims asserted by legal instrument holders. They are not seeking to continue a dialogue with the Forest Service, but to claim that their rights as forest users, established by federal statutes, have been infringed by the agency. Their grievance

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[248] 36 C.F.R. §§ 217, 251 (1992).

[249] *See* 36 C.F.R. § 211.18(b) (1988).

[250] The supplementary information accompanying the proposed change in the appeals rule explicates this view. 53 Fed. Reg. at 17,315-16. The conclusions of the Appeals Regulation Review Team served as a basis for that supplementary information:

> The concept is simple: appeals based on legal rights conveyed by a written instrument to a party would be handled one way, and disputes involving agency discretion in another. Both tracks would be contained in one rule, for example Part A and Part B. On the "A" track, the party must show legal hurt. The "B" track is for parties who request review of other kinds of decisions about which they disagree, but which do not involve a legal instrument to which they are a party. . . .
>
> A two-track system as described recognizes "due process" distinctions that must be made between appellants who hold legal instruments and others who do not. Under principles enumerated in the Administrative Procedures Act, "due process" requirements are higher where rights conveyed by a legal instrument are involved. Thus, requirements in Track A & B concerning ex parte communication and contents of the record would be quite different.

U.S. Dept. of Agriculture, Forest Service, Appeals Review Briefing Paper 20-21 (1987). The agency's response to criticism of the two-track system rested on similar foundations. *See* 54 Fed. Reg. at 3343.

with the agency is concrete and based on legal standards, though less individualized than that of aggrieved instrument holders. Adjudicating their grievances through stripped-down procedures is not appropriate because it ignores their entitlement to equivalent due process.

There are also good reasons for allowing appeals of both plan- and project-level decisions. In the course of drafting the first round of forest plans and defending those plans in administrative appeals, the Forest Service came to realize that the plans and the implementing actions that followed them were better understood as two phases of a single process than as two independent, detached, and fundamentally different activities. Plans establish the parameters under which project-level decisions take place. Individual projects reveal the adequacy of each plan, which then may need to be revised to account for the information revealed through projects. These "tiers" of decisionmaking are iterative; one informs the other. As noted by Michael Gippert and Vincent DeWitte, attorneys in the Department of Agriculture's Office of General Counsel, "[t]he value of the multilevel approach is that it allows for flexible management that responds to new information and circumstances."[251]

Moreover, many of the most critical decisions affecting forest lands take place at the project level rather than at the plan level. Perhaps the clearest message in the forest plan appeals decided thus far is that plans are framework documents only. They establish the goals and objectives for forest managers, identify lands suitable for timber production, establish a ceiling on how much timber can be offered for sale during the plan's 10-year duration, provide monitoring and evaluation requirements, and recommend wilderness designation and wild and scenic river status.[252] They do not, however, represent a "final and irretrievable commitment of resources," in terms of NEPA. For this reason, many questions cannot be answered by forest plans, and appeals involving these issues must await the site-specific phase of the decisionmaking process. The Acting Assistant Secretary made this point quite plainly in an appeal decision on the Beaverhead National Forest plan:

> I must stress the need to remember the purposes of an LRMP. An LRMP does not, unless specifically indicated, make site-specific decisions. Under the staged decisionmaking procedure used by the Forest Service, mandatory review of each stage (LRMP and project) prevents the telescoping of any and every projected environmental concern, such as those concerning sensitive species, into one overwhelming obstacle which must be addressed at the LRMP stage. Attempts to read site-specific decisions or direction into an LRMP does not specify *how* each project is to comply with these requirements, which is sensible given the variety of site-specific conditions. For these

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[251] Gippert & DeWitte, *Forest Plan Implementation: Gateway to Compliance with NFMA, NEPA, and Other Environmental Laws*, U.S. Dept. of Agriculture, Forest Service, CRITIQUE OF LAND MANAGEMENT PLANNING, Vol. 10 (1990).

[252] Loose, *Forest Plan Appeal Decisions: Guides to the Future of the U.S. Forest Service*, 15 Western Wildlands 2, 3 (1990).

reasons all parties must be careful to view and use the LRMP for what it is, programmatic direction for management of the various resources of a Forest.[253]

Because plans and projects are interlocking pieces of a single process, and because the project phase presents the opportunity to contest specific claims concerning the effects of agency action, there is little reason for the agency to limit appeals to plans only.

2. *Pre-Decision Public Participation.*

An important consideration of the appeals process is the form and extent of public participation that precedes the decisions that can be appealed. NFMA requires public notice and comment as part of the development of forest plans.[254] Many forest units provide similar pre-decisional notice and comment for project-level decisions as well. The 1992 USDA proposal and the 1993 Appropriations Act impose notice and comment procedures for pre-decisional review.

Pre-decisional public involvement is important for several reasons. It provides the agency with information and viewpoints at a stage when a decision can be modified. It introduces members of the public to the full range of concerns implicated in a decision before they have formed final judgments, and it forces them to voice their opinions at a time when they can be most effective.[255] It also enables the agency to clarify misunderstandings and resolve disputes more easily at the pre-decisional stage, rather than at subsequent stages of the decisionmaking process.[256]

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[253] Decision in Appeals Nos. 1575 & 1596, Beaverhead National Forest Plan (Aug. 17, 1989).

[254] 16 U.S.C. § 1612(a) provides:

> In exercising his authorities under this subchapter and other laws applicable to the Forest Service, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

[255] As discussed below, participation in the pre-decisional phase of a decision would be a jurisdictional prerequisite to later appeals under the system recommended in this article.

[256] Negotiations and alternative dispute resolution should take place during the pre-decisional phase of the process, not at the appeal stage as the existing regulations encourage. For discussion of dispute resolution techniques, see J. WONDOLLECK, PUBLIC LANDS CONFLICT AND RESOLUTION: MANAGING NATIONAL FOREST DISPUTES (1988); Shands, Sample & LeMaster, *National Forest Planning: Searching for a Common Vision*, U.S. Dept. of Agriculture, Forest Service, Critique of Land Management Planning, Vol. 2 (1990).

The time for dispute resolution is *before* a decision is finally made. Appeals of that decision should be designed to adjudicate specific objections and complaints, not to reopen the

The 1992 USDA proposal did not provide an adequate model for pre-decisional public participation. It would have notified the public of upcoming projects in local newspapers, which would be listed periodically in the *Federal Register*. However, the potentially interested public extends well beyond the circulation of these local newspapers. It is unreasonable to expect a person living in Virginia, for example, to keep abreast of newspapers in the Pacific Northwest in order to ascertain the pendency of individual forest sales or mineral leases. If this person requests notification of pending sales, it is not unduly burdensome to require the agency to provide such notice by mail. Many forest units already follow such a procedure. The 1993 Appropriation legislation appears to account for this deficiency in the USDA proposal by requiring the Forest Service to mail notice "to any person who has requested it in writing and to persons who are known to have participated in the decisionmaking process."[257]

However, the 30-day comment period provided by both the USDA proposal and the Appropriations Act may not be sufficient for complex projects. This period should be extended, upon request, to 45 days for projects. This investment of time is well worth the cost it entails, because better-informed participants will be more likely to submit more carefully honed comments (and hence more streamlined appeals), making the agency's job upon appeal that much easier.

3. *Independent Board of Forest Appeals.*

Forest officers should be relieved of the burden of processing appeals. Appeals should be decided by an independent board of appeals within the Department of Agriculture. Proposals of this sort have been raised from time to time over the past several years. The agency has rejected this idea primarily because, in its view, such an arrangement would add a layer of legal formality to appeals process which would undermine the agency's desire to maintain a flexible, informal system.[258]

But the advantages of establishing an external appeals board far outweigh its disadvantages. Line officers are torn between the competing, and sometimes conflicting, roles of on-the-ground management and appellate decisionmaking. A common criticism of the existing appeals system is that it siphons time and resources from management activities. An independent appeals board would enable line officers to concentrate on their primary duties -- to get out of court and get back into the forests, to echo Senator Humphrey. Consolidating responsibility for appeals in a single body would also promote consistency in appellate decisionmaking, creating a more accessible and useful "common law" of Forest Service appeals. Moreover, an

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decision to negotiation.

[257] Pub. L. 102.381, § 322(b)(1)(A). See note 116 and accompanying text for a discussion of the construction of this provision.

[258] *See* U.S. Dept. of Agriculture, Appeals Review Briefing Paper, at 16-17 (discussing, and rejecting, external appeals board).

independent appeals board would also be better insulated from the agency's internal political pressures, fostering both the appearance and reality of due process and impartiality, rare and precious commodities in the modern Forest Service.

The composition of the appeals board is critical. The combination of scientific, legal, and public policy issues embedded in public forest disputes suggests that the board should include experts in biological and ecological sciences in addition to foresters and attorneys. A board dominated by one profession would tend to restrict its view of the matters before it to the areas of its own expertise, undermining its ability to decide hard cases with sophistication and foresight. An interdisciplinary board, by contrast, would more fully understand the implications of the issues and arguments before it. At best, the board's decisions would reflect the cross-fertilization of knowledge and experience that comes with interdisciplinary consideration. At least, an interdisciplinary board would prevent a single professional viewpoint from dominating considerations. A wide range of expertise is all the more necessary given the evolving character of the board's efforts. The sustainability principle, for example, is not a simple or self-defining concept. Its meaning and application would necessarily evolve over time, as the board considers a growing variety of situations, arguments, and evidence.[259]

To assure adequate representation of the relevant disciplines on the board, members should be selected to fill three general categories of expertise: Technical, scientific, and legal. Technical experts would have knowledge of the specific decisionmaking techniques and computer models employed by the agency. Scientific experts would have knowledge of matters such as conservation biology, forestry, and hydrology. And legal experts would have knowledge of hearing procedures, statutory interpretation, and legal argumentation.

Representation of each of these categories of experts should be equal, both on the board as a whole and in the panels formed for particular cases. The board as a whole could be made up equal numbers of technical, scientific, and legal experts (for instance, five of each for an entire board of 15 members). Panels of three board members, one from each category, would be chosen at random for each appeal. The panel member from the legal category would preside

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[259] There is precedent for an administrative decisionmaking board composed of scientific experts. The Food and Drug Administration has used a "Public Board of Inquiry" (PBOI) to obtain competent scientific review of certain regulatory actions. The PBOI consists of a panel of three scientists selected by the Commissioner, two of whom are chosen from recommendations of the parties. According to the Administrative Conference of the United States, the PBOI "combines the elements of a 'scientific hearing' with the more typical 'adversarial hearing' approach to the evaluation of scientific evidence. . . . The Board obtains scientific 'testimony' within an informal quasi-adjudicative hearing framework, in which the advocacy role of lawyers is minimized in favor of a 'scientific forum' approach . . . ." Recommendations of the Administrative Conference of the United States, 1 C.F.R. § 310.11 (statement on hearing procedures for the resolution of scientific issues) (1992). The Administrative Conference recommends continued experimentation with such alternative types of hearing procedures. *Id.*

over any fact-finding hearings or oral presentations, but each member of the panel would have an equal vote in the ultimate decision. To deal with matters of administration and case management, one member of the board would be selected chair.

Appointment procedures would safeguard the independence of the board. The Secretary of Agriculture or the Chief of the Forest Service could appoint forest appeal board members who would be protected senior executive service civil servants, like Interior Board of Land Appeals (IBLA) judges.[260] To ensure the appointment of qualified board members, the selection process could include a nominating procedure or screening by a nonpartisan advisory committee, which could submit a list from which the Secretary or Chief would have to choose. The board members should be selected for stated terms, such as five years. Once the board is established, its members would serve staggered terms, with a new trio of members (one from each category of experts) replacing the senior-most trio each year. This would help preserve the institutional memory of the board, while counteracting the tendency toward political interference.

The board would review only Forest Service decisions. The creation of a "superboard" for both Forest Service and Bureau of Land Management (BLM) decisions may be desirable at some point in the future, but limiting the jurisdiction of the board to Forest Service decisions appears to be the wisest immediate course. The Forest Service and the BLM are subject to overlapping, but not identical, statutory directives. A superboard for both agencies would have to face the complexities inherent in applying two sets of laws. An independent board of forest appeals would not be inconsistent with existing Forest Service organic legislation.[261] The NFMA's companion statute for the BLM, the Federal Land Policy and Management Act (FLPMA), contains specific authority relating to appeals which might need to be amended before the creation of an superboard of appeals. Moreover, the new forest service board would face a novel enough task without having to address BLM decisions as well. Since this board will venture into uncharted territory, it seems reasonable to work the kinks out of the system with a forest board of appeals before creating a larger superboard.

4. *Standing to Bring an Appeal.*

Like the project-level appeals process mandated by the 1993 Appropriations Act,[262] standing to bring a Forest Service appeal before the board would be limited to individuals who submitted comments during the pre-decisional phase. Claims asserted in the appeal would likewise be limited to those raised during the comment period.

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[260] The Appendix and Table 2 describe the IBLA and summarize its procedural rules.

[261] Only the recently enacted appropriations rider, Pub. L. 102-381, §322, would need to be amended to accommodate an independent review board.

[262] Pub. L. 102-381, § 322(c).

This limited standing requirement would better serve the purposes of the appeals system. Appellants would be forced to raise their objections early in the decisionmaking process when the agency could more readily change its decision based on such objections. Ensuing appeals would likely be more carefully targeted. A standing rule would also prevent appellants from staging last-minute arguments causing delays and potentially abusing the system. The rule would work only if coupled with the pre-decisional public participation provisions discussed above. A more limited rule of standing is a fair price for appellants to pay in exchange for appeal procedures better suited to reaching and resolving the merits of their claims.

A critical, and possibly large, exception to this strict standing rule would be available where the agency's decision is based on information or analysis which the appellant could not have fairly ascertained from the predecisional notice of the action. In such instances, appellants who would otherwise lack standing could raise objections to the decision based on the new evidence or analysis asserted by the agency. This would ensure that the actual grounds for decision are tested, and would prevent the agency from foreclosing scrutiny of its decisions by basing them on facts or rationales not asserted in the predecisional phase of the action. The 1993 Appropriations Act rule is deficient in failing to provide for this exception.[263]

5. *Dismissal of Claims.*

The new appeal system would explicitly authorize the board to dismiss frivolous claims. Although the current rule already provides such authority, there is widespread confusion about the issue. Even the Chief of the Forest Service has implied that the agency lacks authority to dismiss frivolous claims, complaining that the current system is overwhelmed with bad-faith appeals. Under the new system, such appeals should be dismissed without delay.

6. *Consolidation.*

A potential problem with an appeals system open to all members of the public is the possibility of numerous appeals of the same decision. If all appellants are permitted to assert separate appeals, the appeals board might be forced to wade through a quagmire of conflicting and repetitious claims, particularly in controversial cases. To avoid this problem, the new appeals system would allow the board to consolidate in a single appeal similar claims arising from the same set of circumstances and designate one or several lead appellants. The board should monitor the consolidation to ensure fair leadership. While consolidation cuts off the ability of some appellants to claims on their own behalf,[264] it is justified in order to present the appeals

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[263] *See* note 118 and accompanying text.

[264] To preserve the issue of consolidation for judicial review, consolidation orders would themselves be appealable through a motion for reconsideration before the panel that issued the consolidation order. If a court later reverses the consolidation order, it would remand the case to the board with instructions to allow the appellant to bring a separate claim.

board with a manageable set of appellants and claims. Because all appeals would be consolidated in this manner, there would be no need for a right of intervention as under the current appeals rule unless an intervenor could show that consolidated leadership would fail to represent its interests.[265]

7. *Proceedings.*

Appellants would file a statement of reasons in a separate document from the notice of appeal, as under the 1983 version of the appeals rule.[266] A thirty to forty-five day period following notice will allow appellants sufficient time to gather information and sharpen their arguments. The agency would then file a responsive statement, to which the appellant could respond in a brief reply. Forcing the challenged decisionmaker to respond focuses the appeal on precise issues of disagreement. It also focuses the attention of the decisionmaker who may come up with a way to resolve the dispute informally.

All appellants would have the right to present an oral argument before the panel, but they could waive this right if desired. The oral argument would allow the appellant to contest the agency's decision, and the agency to respond, in a less formal atmosphere. Oral argument will help the review board focus on the important issues before it. It would also enable the board panel to probe the arguments of both sides.

Where an appeal raises substantial issues of disputed scientific fact, the panel could conduct a more formal, trial-type proceeding. Such proceedings could include oral testimony, cross-examination, recorded transcripts, and other procedural devices normally associated with administrative adjudications on the record. The proceeding could be conducted before the panel assigned to the appeal, under the lead of the legal expert assigned to the panel. Or, the panel might delegate the fact-finding task to an administrative law judge, as the IBLA does. While these quasi-adjudicative proceedings would add to the formality and duration of appeals, they are justified by the need to obtain an adequate evidentiary basis for decisions in difficult cases.

Like the IBLA, the forest appeals board should stay decisions unless the public interest requires otherwise.[267] Resource development projects usually become irreversible once ground disturbing activity occurs. The automatic stay prevents the process from systematically disadvantaging environmental appellants.

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[265] The interests of individuals who support a decision being appealed would normally be protected by the agency/appellee. At the discretion of the board, however, interested non-appellants could be permitted to submit amicus briefs on either side.

[266] *See* 36 C.F.R. § 211.18 (1988). Similar time frames for filing this document, the responsive statement, and the reply would also apply.

[267] On Sept. 25, 1992, the Department of the Interior proposed reversing this IBLA automatic stay rule to provide for implementation of an appealed decision unless the appellant demonstrates that "a stay is necessary in accordance with standards generally used by courts in ruling of motions for a temporary restraining order." 57 Fed. Reg. 44353. The automatic stay currently does not apply to onshore oil and gas permit decisions. 43 C.F.R. 3150.2 and 3165.4.

The Forest Service should also consider a "fast track" mechanism for expedited resolution of certain appeals. This approach should be considered for appeals where the issues are well-defined or minor, the parties consent to expedited review, the costs of a stay are unusually high, the challenge has bearing on other pending appeals, or there is some circumstance that makes a rapid answer particularly important. A rule might require that some combination of these factors be present for expedited resolution.

8. *Decision.*

The board would be required to issue a written opinion providing a reasoned explanation for its decision. The opinion would be required to make explicit rulings on all non-frivolous claims. Particularly important will be the board's findings on charges that a Forest Service decision violates the sustainability principle. Appellate findings relating to the application of the sustainability principle are the key to integrating procedure with the objectives of public forest management. These findings will nurture the development of the sustainability principle as its contours become more distinct through repeated application to different situations. An explicit requirement to make findings forces the board to make the difficult calls on sustainability. Supported by an opinion that clearly lays out the scientific and social considerations, the board will advance the national and international debate.

To expedite appeals, regulations should establish reasonable but strict deadlines for the forest appeals board. In contrast, IBLA administrative judges have no time limits for issuing opinions and appellants sometimes wait more than a year for a decision.

Written opinions must be compiled and indexed in order for the board's reasoning on the application of sustainability to particular situations to be used by resource managers. Appeal decisions will have precedential value, tempered by the geographical limitations of resource management applications.

9. *Discretionary Review by Secretary of Agriculture.*

In all cases, the Secretary of Agriculture would have the discretion to review the board's decision. The Secretary would be required to decide whether to take the case within a short time period, such as 20 days, after the board's decision. The Secretary would be required to issue a decision on the merits of the appeal within a specific time period after that, such as 45 days for project-level appeals and 60 days for plan-level appeals. The Secretary would not be permitted to take a case before the appeals board has issued its decision, and the Secretary's decision could be based only on the record that was before the board. This contrasts with appeals of BLM decisions, which may be decided by the Secretary of the Interior before the IBLA rules. The Secretary of Agriculture should not be allowed to avoid potentially embarrassing findings by an independent board by prematurely deciding an appeal. If the Secretary fails to act on an appeal within the time period for initiating discretionary review, the board's decision would be deemed the final administrative action of the Department for the purposes of the APA.

10. *Judicial Review.*

Judicial review in all cases would be in the U.S. Court of Appeals circuit in which the disputed plan or project is located. The district courts would not be involved. This is a significant departure from the current system, in which judicial review always begins in the district courts even though they render decisions as if they were appellate courts.[268] Therefore, to implement our proposal, Congress would need to amend 28 U.S.C. §1331, which gives persons harmed by administrative action the right to seek review in federal district court. Along with repeal of the 1993 Interior Appropriations rider section 322,[269] this is the only action required by Congress to implement our proposal.

If the board's decision is issued without trial-type proceedings on the record, the reviewing court would apply the "arbitrary and capricious" standard of review.[270] However, if the board uses trial-type proceedings to establish a basis for resolving evidentiary disputes, the court would use the more searching "substantial evidence" test.[271] The availability of this higher standard of review for certain administrative appeal decisions would obviate the need for trials *de novo* in the district courts. This change would reduce litigation costs for both appellants and the agency, while preserving an active role for the courts in appropriate cases.

This limitation of judicial review is a fair trade-off for appellants if the loss of the district court forum is worth the gain of a fair, independent, credible forest appeal board. The appeals board offers an appellant the advantages of administrative determinations based on both legal compliance and a substantive standard currently unavailable in any forum. The Forest Service would benefit from a reduction in and simplification of litigation.

V. EVALUATION

The proposed reforms discussed in the preceding part of this paper depart significantly from the Forest Service's current practices. To evaluate the proposal's effectiveness, we review it in light of the three previously discussed measures of administrative reform: accuracy, efficiency, and acceptability. Although the proposal is not without costs and disadvantages, on balance it provides a better appeals system on all counts.

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[268] Cronin v. United States Department of Agriculture, 21 ELR 20492, 20493 (7th Cir. 1990). District courts review challenges to IBLA decisions.

[269] Department of the Interior and Related Agencies Appropriations Act, Pub. L. 102-381, §322.

[270] 5 U.S.C. § 706(2)(A).

[271] 5 U.S.C. § 706(2)(E).

A. Accuracy

1. *Strengths.*

Unlike the current appeals procedure, the proposed system gives responsibility for reviewing decisions to a body that is independent from the agency's line officer hierarchy. This arrangement will tend to produce better appeal results for several reasons. Because of its independence within the agency, the appeals board will be less influenced by considerations that are unrelated to the decisions under review, such as concerns about politics, job security, and the need to perform many roles in addition to deciding appeals. Line officers are influenced by the many pressures of their positions.[272] Even if unfounded, accusations of bias unavoidably affect reviewing officers, either making them overcompensate for bias by erring on the side of appellants, or casting them in advance in the role of antagonists to appellants' claims. Repeated allegations of prejudice and partiality inevitably corrode the objectivity of reviewing officers.

Creation of an independent appeals board will also improve the clarity, uniformity, and substance of appeal decisions. The board's only job will be to decide appeals. In contrast to agency line officers, who must balance their appellate roles with a host of competing demands, members of the appeals board can concentrate on performing only one function well. Experience with a nationwide supply of appeals will expose the board to a variety of issues and situations, giving the board a depth of knowledge and precedent that will enrich its decisions. The multidisciplinary composition of the board, reflecting equal measures of legal, scientific, and technical expertise, will also enhance its understanding of the complex problems raised in appeals. The appeals board will neither preclude nor relieve line officers from exercising their responsibility to issue policy and develop standards and guidelines for forest management. Indeed, the board will partly rely on these materials in reviewing decisions.

Relieving line officers of the task of deciding appeals will enable them to focus more of their energy on the complex problems in the field. The existing appeals program asks too much of line officers. Under the current system, they must both competently perform the normal aspects of their job, and also render formal judgments of subordinates' decisions. This system places line officers in a difficult role. Effective supervision often requires a quiet management style -- pointing out errors and praising accomplishments without fanfare or widespread notice. Good supervision also requires trust and confidentiality among members of the agency. All this is undermined by requiring supervising officers not only to point out mistakes but to do so in public appeals decisions.

Consolidating appeals in a single board will also promote better coordination among forest units. A particular action may have consequences that extend beyond the jurisdictional confines

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[272] The 1987 Appeals Review Team found that "most believe the current process is biased, because it is an internal review, and that there is a double standard where timelines are concerned." 53 Fed. Reg. at 17313.

of a forest unit. Forest supervisors might not give sufficient attention to spill-over problems and environmental impacts that affect lands outside of the forest unit. The appeals board would not have such a jurisdictionally constrained view. The board would be in a better position than line officers to take into account the extra-jurisdictional effects of actions under review. It also would be in a better position to ensure that similar issues are resolved in similar ways throughout the far-reaching national forest system. Assigning appeals to scores of line officers across the country fragments agency management. Uniformity need not ignore special circumstances or local conditions; however, it will require an adequate explanation for local variance with sustainability principles. A single appeals board can better assure that appeals decisions are consistent.

Finally, an appeals board will have the time, expertise, and experience to develop a sound and practical approach to applying the sustainability principle. The concept of sustainability can gain content and have a practical impact only through repeated application and the experience that goes with it. The development of this concept will require the full attention of a multidisciplinary expert body. Allowing the sustainability principle to evolve through a series of decisions by an independent board would give the Forest Service a valuable opportunity to develop a workable understanding of the concept. If it succeeds in this effort, the agency would create a model of applied decisionmaking for use by many other nations that are struggling to advance sustainability.

2. *Weaknesses.*

The Forest Service has been accused of seeking to "bomb proof" its decisions to guard against administrative appeals and litigation. Decisionmakers who must keep one eye on future legal challenges may lack the courage to experiment with new ways of resolving problems. Thus an appeals process, particularly one perceived as being "formal" or "legalistic," might lead to cautious decisions rather than to good ones. However, this problem would seem to be present in any system of administrative appeals. It is not clear how the fear of being second-guessed by the appeals board would deter creativity more than the fear of being second-guessed under the current system. The appeals board, moreover, would be more likely to create independent, innovative solutions of its own that might facilitate future compromise.

Consolidating appellate responsibility in a single body cuts against the agency's tradition of decentralization. The Forest Service has long prided itself on a bottom-up approach to decisionmaking, echoing Gifford Pinchot's dictum that local decisions should be made on local grounds.[273] While local questions should indeed be made on local grounds, the Forest Service now deals with matters that are increasingly national in scope. Purely local questions may be more the exception than the rule, and decisionmakers cannot simply respond to local conditions without considering the broader effects of their actions. The simple fact is that federal law

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[273] "In the management of each reserve, local questions will be decided on local grounds . . ." U.S. DEPT. OF AGRICULTURE, FOREST SERVICE, USE BOOK 17 (1906 ed.).

prescribes the bounds of management that constrain local autonomy. Testing decisions against nationwide legal principles is the primary justification for administrative appeals. The resulting appeals decisions should reflect a consistent approach to similar issues. Thus, while the proposed appeals board would indeed counter the agency's tradition of decentralization, it would do so for important and worthwhile reasons.

B. Efficiency

1. *Strengths.*

In contrast to the existing appeals system, the proposal would limit standing in administrative appeals to individuals who participated in the pre-decisional phases of the action. This standing restriction would place a premium on pre-decisional comments and negotiation. Parties would be required to air all of their objections before a decision is made, creating a better opportunity to resolve disputes early in the process. A strict standing rule would also prevent appellants from withholding their best arguments until appeal, causing unnecessary delays in decisionmaking process. In order for the Forest Service to realize this benefit, it will have to improve its method of giving pre-decisional notice of actions.

The proposal authorizes the dismissal of frivolous claims. Critics often depict the current system as one bedeviled by sham appeals. If an appeal truly lacks merit, the appeals board should be able to dismiss it readily. If the Forest Service cannot implement the current system to efficiently dispose of frivolous appeals, the proposed system would cure this defect. The proposed consolidation requirement also advances the cause of efficiency. Appellants bringing similar claims would be required to consolidate their claims under one or more lead appellants. This would lessen the burden on the appeals board, and sharpen the claims presented.

Although the proposal adds some new procedural elements to the administrative appeals system, it also eliminates one layer of judicial review. This might cause a longer wait for a final agency action, but it will speed ultimate resolution of major conflicts that go to court. A board of forest appeals will greatly reduce litigation delays.

2. *Weaknesses.*

Still, a board of forest appeals may take months more to render a decision than the first level reviewer in under the current rules. Fact-finding hearings before the board would add another layer of legal formality to the appeals process, and could lead to further delays. However, delays associated with the new process could be minimized by imposing reasonable time limitations on the board's consideration of appeals.

C. Acceptability

1. Strengths

Under the current appeals system, there are as many forums for appeals in the Forest Service as there are line officers above the district ranger level. Such a multitude of appeal officers, unguided by clear standards for rendering appeal decisions, produces inconsistencies in

the quality and accessibility of appeal decisions. Appeal decisions are not cataloged or indexed, making research nearly impossible and hindering efforts to develop a unified "law" of Forest Service appeals. The disorganized state of the Forest Service appeals also makes appellants suspicious of the objectivity of appeals rulings, making the decisions appear more dependent on the whims of the reviewing officer than on any objective body of policies and legal principles.

The proposed reforms would make the appeals process more understandable and available to the public and the rest of the agency. Decisions would be issued by a single body rather by scores of separate individuals. All decisions would be accessible to interested persons, and the board would develop a body of precedent to guide future decisions. The independence of the board would add to its impartiality and institutional prestige. If the board is viewed by appellants as providing an objective opportunity to contest agency decisions, its decisions will command greater respect. Parties before the board will be more likely to feel that their views are taken seriously. They will accept the decisions of the board, regardless of the outcome, more readily than they accept the decisions of reviewing officers under the current system.

2. *Weaknesses.*

Since the proposed reforms break sharply with prior practice, they may initially meet with resistance. Administrative appeals within the Forest Service have been a hotly contested subject for years. Practically any solution will alienate some parties. A solution like the one proposed here, that expands procedures available in some instances but restricts them in others, is bound to provide something for almost everyone to hate. Thus, this proposal is likely to be controversial; and even if it is adopted, to be opposed by some participants in the debate over forest policy. The proposal is not a panacea. It cannot solve by itself the many problems plaguing the Forest Service. It merely offers a better mechanism for dealing with these problems.

CONCLUSION

The administrative appeals system used by the Forest Service can become a means of resolving the controversies that surround the resources of the nation's public forests. But significant changes, both substantive and procedural, need to be made if appeals are to achieve this goal. Substantively, appeals must determine whether agency decisions are consistent with the legislative mandates pertaining to the management of national forests. Most importantly, appeals must ascertain whether the agency's actions are consistent with sustainable use of the nation's forests. Although it is rarely easy to decide whether a particular forest plan or implementing decision satisfies this principle, the statutes require the agency to address this critical question. Sustainability, moreover, can be evaluated by the Forest Service with greater scientific clarity and consistency than other criteria, such as "multiple use," making it a good candidate for resolution in an appellate proceeding. More importantly, though, setting substantive standards for administrative review will restore public confidence in the agency and renew the Forest Service's position as an international leader in resource management.

Procedurally, the current appeals system must transform in structure and purpose. Instead of being a means for reviewing decisions informally within the line officer hierarchy, the appeals system should provide a formal mechanism for testing agency decisions against the requirements of federal law. To accomplish this goal and provide due process for all parties, the appeals system should be independent of the line officer hierarchy, as would be provided by a multi-disciplinary board of review. Standing to bring an appeal would be limited to parties who submit specific objections during pre-decisional stages of the decision, and appeals would normally be limited to those specific objections as long as the Forest Service has adequately kept the public informed. Judicial review of the agency's action would be available only in the federal courts of appeals, thus streamlining the process of judicial review. Most importantly, an appellate review board making case specific determinations of compliance with Forest Service mandates, including sustainability, can best apply difficult principles and build precedent to improve future decisions. Taken together, these changes would create a more rational, efficient, and acceptable approach to administrative appeals of Forest Service decisions. Appeals cannot cure all of our land management problems, but they can reshape some of the institutional incentives that have led to stalemate and disaffection.

APPENDIX

time, and thus deprive the IBLA of jurisdiction to hear the case.[279] Resource management plans are *not* appealable to the IBLA.[280]

2. *Effect of Appeal on Implementation of BLM Decision.*

A BLM decision will not go into effect while an appeal is pending.[281] When "the public interest requires," the board may order that a decision or part of it will go into effect during the pendency of the appeal.[282] When a decision is given immediate effect, however, the appellant can choose to bring legal action in court rather than continuing the appeal within the agency. The IBLA's usual practice in such cases is to suspend further administrative action on the appeal.[283]

The IBLA's automatic stay contrasts with the Forest Service's Part 217 process. Under Part 217, the appellant must formally request a stay of the underlying decision, specifying the adverse effects of the decision on the appellant, and how harmful effects on resources in the area would prevent a meaningful appeal on the merits.[284] However, the Secretary of the Interior has proposed to reverse the IBLA rule to provide for implementation of an appealed decision unless the appellant demonstrates that "a stay is necessary in accordance with standards generally used by courts in ruling on motions for a temporary restraining order."[285]

3. *Filing the Notice of Appeal and Statement of Reasons.*

To commence an appeal, the appellant must file a "notice of appeal" with the BLM office that made the disputed decision (not with the board) within 30 days[286] after receiving the notice of decision.[287] The appellant must also file a "statement of reasons" why the decision should be overturned, either as part of the notice of appeal or, within 30 days after filing the notice of

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[279] 43 C.F.R. § 4.410(a)(3)

[280] 43 C.F.R. § 4.410(a)(1).

[281] 43 C.F.R. §4.21(a). Onshore oil and gas development permits are an exception to this rule and remain in effect while an IBLA appeal is pending. 43 C.F.R. 3150.2; 43 C.F.R. 3165.4.

[282] *Id.*

[283] Philip Horton, *IBLA Practice and Procedure,* 2 Natural Resources and Environment 36, 38.

[284] 36 C.F.R. § 217.10 (d)(3)(ii).

[285] 57 Fed. Reg. 44353 (Sept. 25, 1992).

[286] All time limits are automatically extended by a 10-day grace period to allow for slow mail service. So the 30-day limit is really a 40-day limit. 43 C.F.R. § 4.401(a).

[287] 43 C.F.R. § 4.411.

under oath, and the right of cross-examination.[298] Appeals of ALJs' interlocutory rulings are not available without permission of the board.[299]

7. Decision.

Appeals are assigned at random among the 11 judges of the IBLA.[300] The board occasionally decides difficult issues en banc, but most decisions are rendered by a panel of two or three judges assigned to the case. The board's decision is the final agency action for the purposes of the APA.[301]

In deciding appeals, the board's authority is commensurate with that of the Secretary.[302] The regulations do not indicate the specific grounds for affirming or reversing the agency, but reversals most commonly result from an incorrect application of the law, and less commonly from a finding that the agency's action was arbitrary, capricious, or an abuse of discretion.[303] The appellant must establish error by a preponderance of the evidence.[304] If the board reverses a decision, its normal practice is to remand the case to BLM for further consideration.[305] BLM decisions are affirmed in about two thirds of the appeals.[306]

Decisions of the IBLA are collected and published by a subscriber service. Legal research is facilitated by quarterly "index-Digests" of IBLA decisions, which are consolidated in a hardbound digest every five years. This arrangement contrasts with the disorganized state of the Forest Service's appeal decisions, which are not regularly published or indexed.

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[298] *See* 43 C.F.R. §§ 4.430-4.439.

[299] 43 C.F.R. § 4.28.

[300] *Congressional Research Service, Appeals of Federal Land Management Plans and Activities* 7 (Feb. 20, 1990) [hereinafter CRS Report].

[301] 43 C.F.R. § 4.403

[302] 43 C.F.R. § 4.1.

[303] Horton at 38.

[304] *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984) (reversing prior requirement of clear and definite showing of error, as discussed in Horton at 38).

[305] *Id.*

[306] CRS Report at 10.

completed at the beginning of 1990, about 50 had been protested, with each plan generating about a dozen separate protests.

The Director may dismiss a protest without ruling on its merits, deny the protest in whole or in part, return the proposed decision to the State Director for clarification or further consideration, or uphold protest in whole or in part.[316] The director will uphold a protest when: Approval of the proposed plan would violate Federal statutes or regulations; approval of the proposed plan would be contrary to the Director's policy guidance; or significant aspects of the proposed plan are based upon invalid or incomplete information.[317]

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[316] United States Department of the Interior Bureau of Land Management, *Interim Guidance: Resource Management Plan Approval and Use* § 1617.21(F) (Attachment 1-4).

[317] *Id.*

TABLE 1

Administrative Appeals in the Department of the Interior

Because the U.S. Department of the Interior (DOI or Interior) Bureau of Land Management (BLM) makes resource management decisions similar to the Forest Service, a comparison of appeals systems is instructive. There are two tracks for BLM appeals. Resource management planning and land classification are handled by the BLM through a protest procedure.[274] This procedure is discussed in Part B, below. Other decisions made by the BLM and other Interior agencies are appealed to the Interior Board of Land Appeals (IBLA). The IBLA's caseload involves oil and gas leasing, surface mining and hard-rock mining claim issues.[275] Other cases involve rights-of-way, grazing, coal lease readjustments, timber sales, and general property rights cases.[276] The discussion of the IBLA in this Appendix focuses on appeals of BLM decisions because they are likely to be the most analogous to Forest Service decisions.

Table 2 summarizes both DOI appeals systems in terms of the same procedural elements used to characterize the past and proposed Forest Service appeals systems in Table 1.

A. The IBLA

The IBLA procedural structure parallels to some extent the proposed independent appeals board for the Forest Service. The IBLA was established in 1970, in response to recommendations of the Public Land Law Review Commission's report, *One Third of the Nation's Land*. Before this time, the Bureau of Land Management (BLM) reviewed appeals internally, through a system similar to the present Forest Service appeals process. Congress subsequently endorsed the Commission's recommendation in the Federal Land Policy and Management Act by requiring the Secretary of Interior to structure adjudication procedures to assure "objective administrative review of individual decisions . . . ."[277]

1. Who May Appeal?

According to subpart E, "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal" to the IBLA.[278] The Secretary may approve an appealed BLM decision at any

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[274] 43 C.F.R. § 4.410(a)(1) (1992).

[275] Horton, *IBLA Practice and Procedure*, 2 Natural Res. & Envt. 36 (Spring 1986).

[276] *Id.*

[277] 43 U.S.C. § 1701(a)(5).

[278] 43 C.F.R. § 4.410(a).

TABLE 1: USFS ADMINISTRATIVE APPEALS

Important Elements of Administrative Appeals Process	1983-1989 USFS Appeals Rule § 211.18	USFS Appeals § 251	USFS Appeals § 217	3/26/92 proposed changes to § 217	Independent Board of Forest Appeals
Decisions Subject to Appeal	Decisions concerning NFS unless covered by special law	Written instruments authorizing occupancy & use of NFS lands	Written decisions subject to NEPA and NFMA	Approval, revision or significant amendment to LRMP	Decisions concerning NFS unless covered by special law
Standing	Anyone	Eligible applicant or holder of instrument	Anyone	_____	Anyone who submitted comments in pre-decisional phase
Levels of Appeal: Reviewer(s)	Right to second appeal unless first appeal is to Chief or higher; Line officer review	Right to second appeal only if first is to supervisor; Line officer review	Right to second appeal only if first is to supervisor; Line officer review	_____	Independent administrative appeals board
Notice of Appeal: Deadline	45 days	45 days	45 days; 90 days for LRMPs	_____	45 days
Notice of Appeal: Content	How appellant is affected and relief	Adverse affect on appellant; Relief; Law, regulation, policy violated	Relief; Law, regulation, policy violated	_____	How appellant is affected and relief
Intervention (in first level of appeal)	Anytime; Must have immediate interest; Discretion with review officer	Anytime; Applicant or holder of written instrument whose interest may be affected	Within 20 days of notice; Cannot request stay or continue case	_____	Consolidation required
Stays	Discretionary	Discretionary	Discretionary; Not available for LRMPs; Automatic 7-day following decision notice	_____	Automatic unless public interest requires otherwise; Expedited review possible
Appellant's Argument	Statement of reasons raising all issues due 45 days after notice of appeal; Extensions for good cause	In notice of appeal	In notice of appeal	_____	Statement of reasons due 30-45 days after notice
Deciding Officer's Responsive Statement	Must respond to each issue 30 days after filing of statement of reasons	Must respond to specific facts and issues 30 days after notice of appeal	None	_____	Must respond to each issue 30 days after statement of reasons
Appellant's Reply	20 days after responsive statement	20 days after responsive statement	N/A	_____	20 days after responsive statement
Oral Argument	Discretionary; Informal procedures set by reviewing officer; non-adversarial	Right if requested in notice; Informal procedures set by reviewing officer; Non-adversarial	None	_____	Right if requested in statement of reasons; informal
Decision	30 days after close of record	30 days after close of record	100 days; 160 days for LRMPs	_____	100 days

TABLE 2

appeal, as a separate document submitted to the IBLA.[288] After filing the initial statement of reasons, the appellant may file "additional statements of reasons and written arguments or briefs" within 30 days after filing the notice of appeal.[289] The appellant must serve the notice of appeal and any statement of reasons on all adverse parties.[290]

4. The Answer.

Parties served with the notice of appeal may respond to the appellant's arguments in an "answer." Answers must be filed within 30 days after service of the statement of reasons. The answer must "state the reasons why the answerer thinks the appeal should be sustained."[291] BLM's failure to file an answer does not result in default, although, according to Judge Horton, the IBLA "frequently observes that no answer was filed in the course of holding for the appellant . . . ."[292] BLM does not file answers in the majority of appeals, but in some cases the board has ordered the agency to file an answer.[293] The regulations do not provide an opportunity for responding to the answer.

5. Intervention.

The IBLA may allow intervention at its discretion. Interested persons may file a request to appear as amicus curiae. If granted, the amicus appearance "will be for such purposes as established by the [IBLA]."[294]

6. Proceedings.

Oral arguments are discretionary with the board.[295] To resolve factual issues, a party may request that the case or portions of it be referred to an Administrative Law Judge (ALJ) in the Division of Hearings.[296] The board, on its own motion, may also make such a referral. If a hearing is ordered, the board specifies the issues on which the hearing is to be held.[297] The hearings include standard APA hearing procedures, including subpoena of witnesses, testimony

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[288] 43 C.F.R. § 4.412.

[289] 43 C.F.R. § 4.412(a).

[290] 43 C.F.R. § 4.413.

[291] 43 C.F.R. § 4.414.

[292] Horton at 39.

[293] *Id.*

[294] 43 C.F.R. § 4.3(c).

[295] 43 C.F.R. § 4.25.

[296] 43 C.F.R. § 4.415.

[297] *Id.*

TABLE 2: DOI ADMINISTRATIVE APPEALS

Important Elements of Administrative Appeals Process	IBLA	BLM RMP Protests
Decisions Subject to Appeal	Decisions not approved by Secretary; RMP decisions excluded from IBLA review	RMPs; May raise only those issues submitted during planning
Standing	Persons adversely affected by decision of BLM officer or ALJ	Persons who participated in planning & who have an interest that may be adversely affected by RMP.
Levels of Appeal: Reviewer(s)	Some decisions must first be appealed to an ALJ; Independent administrative judge review	One appeal to the Director
Notice of Appeal: Deadline	30 days	30 days after EPA's publication of receipt of FEIS
Notice of Appeal: Content	Identification of decision; May contain argument	Why State Director's proposed decision is believed to be wrong
Intervention (in first level of appeal)	Discretionary; Interested persons may request to appear as amicus curiae	None
Stays	Automatic unless public interest requires otherwise (except on-shore o/g development permits)	N/A
Appellant's Argument	Statement of reasons may be filed or amended within 30 days after notice of appeal	In notice of appeal
Deciding Officer's Responsive Statement	Discretionary response to the appeal within 30 days	N/A because no decision yet made; State Director submits report analyzing the protest
Appellant's Reply	Discretionary with IBLA	N/A
Oral Argument	Discretionary (seldom granted)	None
Decision	No deadline	Promptly (usually 9-10 months)

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B. BLM Protest Procedure for Resource Management Plans

As noted previously, the IBLA does not have jurisdiction to hear appeals of FLPMA resource management plans (RMPs). The RMPs are analogous to Forest Service LRMPs. Protests may occur before either initial plan adoption or plan amendment. Person wishing to challenge the approval or amendment of an RMP must use the "protest" procedure.[307] The IBLA does decide appeals of project level decisions that implement the RMP.

The protest procedure provides a narrower form of review than either the IBLA process or the Forest Service's Part 217 appeal procedures. The procedure is limited to persons who participated in the earlier planning process and who have an interest which may be adversely affected by the approval or amendment of the plan.[308] The protest may raise only those issues which were submitted during the planning process.[309]

Protests must be filed in writing with the Director within 30 days of EPA's publication of the notice of receipt of the final EIS.[310] The protest must indicate the parts of the plan being protested, the issues being protested, and provide a concise statement explaining why the State Director's proposed decision is believed to be wrong.[311] A unique feature of the protest procedure is that it occurs *before* the agency makes a final decision. A protest, filed after the FEIS on an RMP, delays the approval of the preferred alternative until the Director renders a decision on the protest.[312]

The Director "shall promptly render a decision on the protest."[313] The decision on the protest must be in writing and must specify the reasons for the decision.[314] The Director takes about nine or ten months to rule on a protest.[315] Of the 61 FLPMA resource management plans completed at the beginning of 1990, about 50 had been protested, with each plan generating about a dozen separate protests.

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[307] 43 C.F.R. § 1610.5-2.

[308] 43 C.F.R. § 1610.5-2(a).

[309] *Id.*

[310] 43 C.F.R. § 1610.5-2(a)(1).

[311] 43 C.F.R. §1610.5-2(a)(2).

[312] 43 C.F.R. § 1610.5-1(b).

[313] 43 C.F.R. § 1610.5-2(a)(3).

[314] *Id.*

[315] CRS Report at 9.

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